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THE  
INDIAN LAW REPORTS.

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VOL. II.  
1880.

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ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND  
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON  
APPEAL FROM THAT COURT.

---

REPORTED BY

Privy Council

... N. H. THOMSON, *Faculty of Advocates in Scotland.*

High Court

{ G. T. SPANKIE, *Lincoln's Inn.*  
BABU DWARKA NATH BANARJI, *Junior Govern-  
ment Pleader (Offg.)*

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ALLAHABAD:

PRINTED AT THE GOVERNMENT PRESS,  
AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT,  
UNDER THE AUTHORITY OF THE GOVERNOR-GENERAL IN COUNCIL.

Rec. April 1, 1896.

# JUDGES OF THE HIGH COURT.

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## CHIEF JUSTICE :

HON'BLE SIR ROBERT STUART, *Kt., Q.C.*

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„ R. SPANKIE.

„ R. C. OLDFIELD.

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THE  
INDIAN LAW REPORTS,  
Allahabad Series.

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ORIGINAL CIVIL.

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1878  
July 19.

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*Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and  
Mr. Justice Oldfield.*

LACHMI NARAIN (PLAINTIFF) v. RAJA PARTAB SINGH (DEFENDANT).\*

*British Territory in India, Power of the Crown to Cede.*

*Held*, that the British Crown has the power, without the intervention of the Imperial Parliament, to make a cession of territory within British India to a foreign prince or feudatory. The opinion expressed by the Privy Council in *Damodar Gordhan v. Deoram Kanji* (1) followed. Question as to what amounts to a cession in sovereignty discussed.

THIS was a suit on a bond, which charged certain villages situated partly within the District of Bareilly, and partly within the territory of the Nawab of Rampur, with the payment of certain money, the suit being instituted in the Court of the Subordinate Judge of Bareilly. The defendant set up as a defence to the suit, amongst other things, that the Subordinate Judge had no jurisdiction to make a decree for the sale of the villages situated within the territory of the Nawab of Rampur, inasmuch as such villages were not within the North-Western Provinces of India or within British India, but belonged to a Foreign Prince, to whom they had been ceded by the British Government. The suit having been transferred by the High Court to itself for trial, the following issue, amongst others, was fixed by the Court for trial, *viz.*, are the villages (mentioning their names) or any and which of them within the local jurisdiction of the District Court of Bareilly. The facts of the case are fully set forth in the judgment of the Court.

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\* Original Suit No. 3 of 1877.

(1) I. L. R., 1 Bom., 67.

1878

Mr. Conlan, for the plaintiff.

LACHMI  
NARAIN

Pandit Bishambar Nath and Mir Akbar Husain, for the defendant.

v.  
RAJA PARTAB  
SINGH.Mr. Evans appeared as *amicus curiæ* in support of the defence to the suit which has been set forth above.

Mr. Evans.—The question before the Court is whether the Court has jurisdiction over certain villages situated in a tract of country the subject of a sanad dated the 23rd June, 1860 (1). Prior to that sanad these villages formed part of the District of Bareilly, and were British territory in India, subject to the jurisdiction of the British Courts of Bareilly, and administered by the British Executive Government. That sanad purported to “bestow those villages on the Nawab of Rampur” and to “annex them to his old territory on the same conditions on which he held that territory.” This does not purport to alter the status of the Nawab or to give him higher rights in the annexed territory than he had in his old territory. It is therefore necessary to ascertain what was the nature of the so-called Jaghir of Rampur and of its ruler the Nawab. For the purpose of ascertaining this it is open to the Court to consult histories, treaties, and the recorded proceedings of Government, and even to refer to the Foreign Office—*The Charkieh* (2); *Taylor v. Barclay* (3). [Mr. Evans then referred to the various matters connected with the history and status of Rampur which are fully set out in the judgment, and to a report from the Political Department of the Government of India upon the internal administration of Rampur, and submitted that it was clear that Rampur was an autonomous subordinate State of a class well known and frequent in India and often described as Feudatory States.] Apart from evidence the Court is bound to hold that Rampur is a State of this class, because it is recognised by the Executive as such, and the Court cannot go behind that recognition and inquire whether it is a rightful recognition or not—Wheaton, Int. Law. Lawrence’s 2nd annotated ed., p. 47; *City of Berne v. The Bank of England* (4). The paramount power in India has always claimed to exercise an undefined power of control over this class of States. An independ-

(1) Aitchison’s Treaties, ed. by Talbot,  
vol. ii, p. 19.

(3) 2 Sim., 213.

(4) 9 Ves., 347.

(2) L. R., 4 A. & E. at p. 74.

ent State has been defined as one owning no superior except the Ruler of the Universe. Probably there is no independent State in India except the British Government. Nipal (which at first sight seems an exception) theoretically acknowledges the suzerainty of the Chinese Empire—Atchison's *Treaties*, ed. by Talbot, vol. ii, p. 157. It is clearly recognized by the text-writers on international law that a State may exist *quod* State, i.e., retain its "Political personality," notwithstanding a very great "*imminutio imperii*" resulting from its relation with other states.

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The distinction between "British Territory in India" or "British India" and the Native States of India over which the Crown claims to exercise the imperial powers formerly exercised by the Mughal Emperors of Hindustan has always been clearly recognised (see the Civil Procedure Codes of 1859 and 1877, and the Extradition Act of 1872). This distinction was evidently in the minds of the framers of Stat. 21 and 22 Vic., c. 106, which enacted "that all territories in the possession or under the Government of the Company, and all rights vested in or which (if the Act had not been passed) might have been exercised by the Company in relation to any territories, should become vested in Her Majesty." The distinction is here clearly drawn between "territories in the possession or under the Government of the Company," and other territories not in the possession or under their Government over which they claimed to exercise "rights" as Paramount Power.

The rights and obligations existing between the Paramount State and the Subordinate States are not defined by any law nor enforceable through Municipal Courts—[he referred to the recent inquiry in the charges against the Gaikwar of Baroda]; nor could a Municipal Court take cognizance of any breach of engagement between State as such—*Nawab of Arcot v. East India Company* (1). The competency of States in this position to enter into engagements *quod* States with the Paramount Power, and to cede territory to and accept territory from the Paramount Power is abundantly illustrated by the history of India for the last century.

If old Rampur was a *quasi* Feudatory State, not subject to British administration or British Courts, but self-governing, it follows

(1) 2 Ves., 56.

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that British territory, if annexed to that State, would cease to be subject to the jurisdiction of British Courts, and would become exclusively subject to the jurisdiction of the Courts of that State. For it is undeniable that the right to possession of land can only be tried in the Court of the State to which the territory belongs, because the Executive Power of that State alone has power to put the claimant in possession—Westlake, art. 61, p. 56.

Now it is clear from the records now placed before the Court that, after the grant of this sanad, these villages were formally handed over by the Commissioner of Bareilly to the persons deputed by the State of Rampur to take possession: that the records were handed over: that the British police were withdrawn: that the new boundary between British India and Rampur was laid down by the survey authorities: and that from that day to this, for 18 years, the whole Government of the ceded territory—revenue, taxation, police, the administration of civil and criminal law—has been conducted by the officials of the Rampur State, without any interference or protest from any British authority or British Court: and that in 1862, before the present High Court was established, the District Court of Bareilly and the Sadar Dewani Adalat of the North-Western Provinces had declined to exercise jurisdiction on the ground that these villages were no longer British territory (1).

It would be enough to stop here, because, where once it is proved that territory is peaceably in the possession of a Foreign State and has been peaceably and willingly handed over to that Foreign State, and the administration thereof voluntarily abandoned by the British Executive, the jurisdiction of the British Courts ceases "*ipso facto*." Whom are they to address their suits and processes to? If the Court exercises jurisdiction and sells the land, the Court is bound under s. 263 of the Procedure Code to place the purchaser in possession by ejecting the defendant or any person holding for him. The distinction between "*de facto*" and mere "*de jure*" sovereignty in its effect on allegiance is pointed out in *Calvin's case* (2). But when a "*de facto*" government is recognised by the Executive, I submit that it is no longer open to the Municipal Courts of the State which has so recognised it to enter into the

(1) Misc. R. A. No. 1384 of 1862,  
 decided the 1st November, 1862.

(2) Coke's Reports.

question whether it is or is not "*de jure*" owner of the domain of which it has been so recognised to be the Sovereign. That peaceable and undisputed possession is a good title in international law apart from lapse of time or prescription is expressly stated by Phillimore in his Treatise on International Law. It is not, however, necessary to rest upon this, for there is a good and valid cession "*de jure*." [Mr. Evans then referred to the despatches of the Secretary of State for India, and the evidence of transfer, and to the argument in the *Bhaunagar Case* (1) and the cases there cited, and to the Charters and Acts relating to the East India Company which are fully referred to in the judgment.]

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The result would appear to be that according to the theory of English law, the whole contractual power of the State and the powers of gift and acceptance are vested solely in the Crown. This cession appearing to be authorised by the Crown, it lies on those who say it is *ultra vires* of the Crown to show how the power of the Crown has been limited or cut down. The effort to do this on the part of the respondents in the *Bhaunagar case* failed completely. The proposition that the Crown could not cede in time of peace without the consent of Parliament is not sustainable. There is not even a single dictum in any text-writer on English Constitutional Law to be found in favour of it, and there are instances in which such cessions have been made, but no instances in which the consent of Parliament was asked. But even if the power to cede were exercisable only at the close of a war, the cession would be good, for it was made after and in consequence of the Indian Mutiny as a reward for faithful assistance rendered at that crisis.

The proposition that the Crown could not cede territory which had been legislated for without such consent is equally devoid of authority and equally opposed to precedent. In addition to the case of Bencoolen there is the cession of Nawabganj in exchange for Handia. This is a case directly in point, for Nawabganj was part of the district of Gorakhpur ceded to the British in 1801 by the same treaty by which these 19 villages were ceded. In 1803 no less than 50 Regulations were passed giving a complete system of laws and institutions and establishing Courts in these districts.

(1) I. L. R., 1 Bom., 367.



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If the general right of the Crown to cede territory in other portions of its dominions were not so clear as it is, it might well be contended that the Crown possessed that power in India. For that power has been exercised from time immemorial by the Sovereigns whom we have succeeded. It was exercised for about a century by the East India Company as delegate of the Crown without question, and was freely exercised by the Crown immediately after it took over the direct government of India, and was never challenged till the *Bhaunagar Case*.

That case was very different to this. In that case there was undoubted jurisdiction when the suit was filed. There was no evidence of any actual delivery of possession to any State. The question was whether a certain document or documents had the effect of validly ceding British territory, and it was decided that, as the documents did not purport to cede territory, they formed no bar to the prosecution of the suit.

It has been well remarked by Sir Henry Maine in an unpublished note on the subject, "that if European principles are to be applied to the interpretation of the relations between the Indian Government and the Native Chiefs, they must rather be the principles of the Law of Nations than those of English Municipal Law. International Law has 'modes of international acquisition' which are set forth in the text-books, *e.g.*, Phillimore, vol. i, pp. 255, 315, but following Roman Law it regards documents, not as modes of acquisition, but as evidence of acquisition. Strictly speaking, alienation is effected by delivery of possession (*traditio*) and acceptance." It makes no difference that the cession is by sanad and kharita and not by a treaty. The engagements are just as valid and the form usual in India. As to the term "jaghir" the grant of the Diwani to the East India Company was in the instrument of

grant termed a jaghir. The history of India in the time of the later Mughal Emperors is full of cases of persons really independent bearing titles indicative of dependence.

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Here there has been complete delivery of possession followed by long and peaceable enjoyment. The gift or cession appears to have been made by a competent donor and accepted by a competent donee, 18 years ago. The transaction being one between States in their political capacity, if the donor wished to resume the gift as invalid, no Municipal Court could take cognizance of the claim. War is the litigation of States, and the only mode of trial is the wager of battle. But neither the donor nor donee is dissatisfied with the transaction.

The cession would appear to be an act of State done by that power in the State to which the performance of such acts is ordinarily intrusted by the nation, and if this once becomes apparent, the Court will not examine further into the matter. The plaintiff in this case is a British subject who took a mortgage of the villages 10 years after the cession, while they were "*de facto*" part of the Rampur State and administered to by Rampur officials. He now argues that the cession is invalid and that this Court has jurisdiction to deal with the land. I submit that the "*de facto*" cession pleaded and proved by the defendant is a good plea in bar of suit so far as it relates to these 19 villages, and that the question of the original validity of the cession does not arise. But as the question has been raised, I further submit that the cession was and is a clearly good and valid cession of territory in form as well as in substance, and that there exists no grounds for questioning it.

Mr. Conlan.—Admitting that there has been a cession of the villages in dispute to the Nawab of Rampur, it was a cession by mere grant and not a cession in full sovereignty, and not only was it a cession by mere grant, but the grant was conditional. The sanad for the villages states that they were "bestowed" on the Nawab on the same conditions as those on which he holds his old territory. His old territory is held by the Nawab in "jaghir," that is to say, subject to his obedience and fidelity to the Paramount Power and to the right of the Paramount Power to resume the territory if it so pleases (art. 4 of Engagement No. IV relating to the

- 1878 State of Rampur, Aitchison's Treaties, ed. by Talbot, vol. ii, p. 9 :  
 LACHMI arts. 2 and 4 of Engagement No. V, *ibid.*, vol. ii, pp. 10, 11 ;  
 NARAIN art. 2 of Engagement dated the 30th December, 1794, *ibid.*, vol.  
 v. ii, p. 13 ; the deed of acknowledgment dated the 30th December,  
 RAJA PARTAB *ibid.*, vol. ii, p. 15 ; agreement dated the 21st August,  
 SINGH. 1840, *ibid.*, vol. ii, p. 18 ; agreement dated the 10th April, 1855,  
*ibid.*, vol. ii, p. 19 ; and art. 2 of agreement with the Nawab  
 Wazir of Oudh dated the 19th September, 1781, *ibid.*, vol. ii, p. 81).  
 Where territory has been ceded in full sovereignty it is expressed  
 to be so ceded—see sanads given to the Rajas of Jheend and  
 Nabha on the 5th May, 1860, Aitchison's Treaties, ed. by Talbot,  
 vol. vi, pp. 82, 87. Where, too, a cession in full sovereignty  
 is made, it is made by "the Viceroy and Governor-General"—  
 see the same sanads—and not by "Government"—see the sanad for  
 the villages in dispute. The validity of a mere grant of territory,  
 and of a grant not in full sovereignty, cannot be determined with  
 reference to the principles of international law. The cession in  
 this case was not made by the Crown. The consent of the Crown  
 was not asked for, and no direct sanction was given by the Crown.  
 The power to cede territory in India in the time of peace is vested  
 in Parliament. It is true that by Letters Patent granted by Geo.  
 II. to the East India Company, bearing date the 14th January,  
 1758, the East India Company were empowered to make treaties  
 of peace and cessions of territory, but the Charters granted by the  
 Crown have always been confirmed by Parliament—see the Act 53,  
 Geo. III., c. 155. Moreover, all the rights and interests pos-  
 sessed by the Company were placed by it at the disposal of Parlia-  
 ment—see preamble to the Act 3 and 4 Wm. IV., c. 85. From  
 the passing of that Act up to the time of the mutiny there have  
 been no important cessions of territory in India in the time of  
 peace by the Governor-General. The instances of such cessions  
 referred to by Mr. Fitzjames Stephen in the *Bhaunagar Case* (1)  
 occurred, with two exceptions, before the passing of that Act.  
 The two excepted instances occurred in 1846 and in 1856 respec-  
 tively, and in one instance the territory ceded was conquered  
 shortly before its cession. That the power to cede territory in  
 India is vested in Parliament appears also from the provisions of

(1) L. R. 6, Ind. App. at pp. 128, 129.

s. 49 of the Act 24 and 25 Vic., c. 85. It is there enacted that the boundary of any province or territory cannot be altered by the Governor-General without the sanction of Her Majesty.

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Where the Crown has ceded territory in the time of peace it will be found that it has done so with reference to a treaty of peace. Treaties of peace are entered into in pursuance of negotiations, and for obvious reasons, it is important that such negotiations should be concluded as quickly as possible. The nation has therefore conferred on its supreme executive the right of making treaties of peace; and where such right exists, the right of ceding territory follows as a consequence. But where there is no treaty, there is no right of cession. A cession of territory by the Crown in time of peace without reference to a treaty is beyond its prerogative—Forsyth Const. Law, p. 182. The cession in this case was made off hand, in the time of peace and without reference to a treaty, in the belief that it would pass unquestioned, and is invalid. A cession of territory by mere grant, and that a conditional grant, cannot release the inhabitants of such territory from their allegiance, and unless a cession of territory does release its inhabitants from their allegiance, it is invalid—Forsyth, Const. Law, p. 186.

The Court (TURNER, O. C. J., PEARSON, J., and OLDFIELD, J.) delivered the following

JUDGMENT.—On the 22nd June, 1871, the plaintiff, a banker at Bareilly, advanced to the defendant Rs. 1,20,000 to bear interest at one per cent. per mensem, and with the following stipulations: that whatever interest might remain due at the end of each year should be added to the principal and bear interest at the rate agreed; and that, in the event of the plaintiff finding it necessary to resort to legal proceedings for the recovery of any sum due to him, the debt should, even after decree, bear interest at the rate agreed. As security for the loan, the defendant mortgaged a large number of villages. Default having been made in the payment of principal and interest, the plaintiff on the 15th September, 1876, instituted this suit to recover Rs. 2,17,402-8-0, due in respect of principal and interest up to the date of suit and future interest at the rate agreed, by bringing to sale the estates mortgaged.

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The defendant admitted the execution of the mortgage-deed and the receipt of the consideration; he also admitted that no moneys had been paid in respect of principal or interest; but he pleaded that the stipulation for the payment of compound interest was a penal provision which the Court was not bound to enforce; and that the stipulation for the payment of interest after decree at the rate of 12 per cent. was inoperative, in that it could not oust the discretion of the Court to award interest on the sum decreed at such rate as the Court might think proper. The defendant also pleaded that, of the estates mortgaged, nineteen were not within the North-Western Provinces nor within British India, but were within the territory of a Foreign Prince, having been ceded to his Highness the Nawab of Rampur, and that the Court had no jurisdiction to order the sale of these estates.

The plaintiff contended that he was entitled to interest at the rate agreed, and that the estates to which the last plea referred were from of old and still continued to be British territory; that the alleged cession conferred on the Nawab merely the right to receive the public revenue assessed on the estate and not territory in sovereignty; that the Nawab was not competent to accept territory in sovereignty; and that territory in British India could not be ceded without the consent of Parliament, which consent had not been obtained.

Seeing that the issue relating to jurisdiction raised important questions of law, this Court, with the consent of the parties, called the case up to its own file for trial.

Inasmuch as the claim affects estates admittedly within the jurisdiction of the Courts of Bareilly, as well as estates which are alleged to be outside the area of the territorial jurisdiction of those Courts, we must dispose first of the issues relating to interest. (After disposing of these issues the judgment proceeded as follows: ) We find that the plaintiff is entitled to recover Rs. 1,20,000 principal and Rs. 97,402-8-2 interest up to date of suit, and interest on the whole debt, Rs. 2,17,402-8-0, at the rate of 12 per cent. from the institution of the suit until realisation.

It remains for us to determine whether, for the satisfaction of the amount due or to become due, the Courts of Bareilly would be

competent to order the sale as well of the estates which lie within the territory alleged to have been ceded to the Nawab of Rampur as of the estates which admittedly still remain in the District of Bareilly.

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The Nawab Mahomed Yusuf Ali Khan Bahadur, having rendered conspicuous services to the British Government during the mutiny, it was determined to confer on him a substantial reward. It was at first proposed to make over to him the pargana of Kashipur adjoining Rampur on the north-west, but bounded on three sides by British territory. The inconvenience of the existence of a "Foreign State" in the midst of British territory was pointed out to the Government of India by the Lieutenant-Governor, North-Western Provinces, on the 20th January, 1860; and for this and other reasons it was suggested that, in substitution for Kashipur the Nawab should receive certain villages in the District of Bareilly, which had once formed part of the Rampur territory and had been taken from it at the close of the last century, and also certain villages in the District of Moradabad. These proposals were sanctioned, and Mr. Inglis, the Collector of Bareilly, in the early part of the year 1860, gave possession to the Nawab's agents of the villages in Bareilly, and among them, of the nineteen villages before mentioned. The revenue records were at the same time delivered to the Nawab's representatives, and "proclamation of the change was made throughout the whole of the assigned tract." On the 19th May, 1860, the Government, North-Western Provinces, reported Mr. Inglis' proceedings to the Government of India, and on the 23rd June, 1860, a sanad was executed by the order of the Viceroy and Governor-General in the following terms :

Whereas Furzund Dil Pizeer Nawab Mahomed Yusuf Ali Khan Bahadur Nawab of Rampur, exhibited from the commencement of the rebellion to the end his unswerving loyalty to the British Government by affording personal and pecuniary aid, protecting the lives of Christians and rendering other good services, to the satisfaction of Government, the Nawab has already been thanked, a *khilat* of distinction has been conferred upon him, the number of his salute guns has been increased, and an addition has been made to his titles. In further recognition of his services the Government hereby bestows on him the villages in Bareilly and Moradabad as per separate schedules, assessed at Rs. 1,28,527-4-0, in perpetuity, from generation to generation. The above villages are now annexed to the old territory of the Nawab on the same conditions on which he holds that territory."

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The names of the nineteen villages appear in the schedule entitled "List of villages situated in Bareilly."

The transfer of the villages to the Nawab excited the apprehensions of the zamindars, who petitioned the Government of India that, on the expiry of the settlement, their proprietary right might be maintained. The substance of the petition having been communicated by the Lieutenant-Governor to the Nawab, His Highness addressed a kharita to the Lieutenant-Governor, in which, referring to the confident hope expressed by the Lieutenant-Governor that he (the Nawab) would not fail to consider the rightful claims of the petitioners, the Nawab assured His Honour that, if it pleased the Almighty, the rights of these petitioners, as well as of others in the same situation, would be duly respected and regarded, inasmuch as he had in his administration made a point of governing his subjects on the recognised principles of equity and justice which obtained under the British rule.

On the 7th March, 1862, a despatch was addressed by the Secretary of State to the Governor-General, of which the following paragraphs are material :—

"(i) I have received and considered in Council your letter, dated 22nd June, 1861, relative to the substitution, with the consent of the Nawab of Rampur, of villages amounting in value to Rs. 1,28,500 for the pargana of Kashipur as the reward of his services during the recent disturbances.

"(iii) I learn ..... with much satisfaction that the Nawab has freely and willingly consented to accept villages in the Bareilly and Moradabad districts yielding about Rs. 1,28,000, in lieu of the Kashipur pargana, which he is stated to have estimated as prospectively worth to him two lakhs of rupees per annum.

"(iv) Among the papers submitted with your despatches is a memorial of some of the proprietors of the transferred estates, setting forth in temperate language objections which must be admitted to be far from unreasonable to the arrangement you have made.

"(v) The transfer to a Native State of villages which have been long under British administration, and formed part of one Regulation Province, is always objectionable. I observe that all these villages which have been transferred to the Nawab of Rampur by the present arrangement have ever since our acquisition of Rohilkhand belonged to the District either of Bareilly or Moradabad. They appear to be all held direct from Government, their respective proprietors being the sudder malguzars paying their revenue to the Collector without the intervention of any talukdar.

“(vi) The Nawab must understand that in those villages, all that he acquires by the transfer is the right to collect and appropriate the assessed revenue, the amount of which cannot be increased during the period of existing engagements; and that, after the expiration of the present settlement, the proprietors will be entitled to re-assessment with the Nawab on the same principles as are accorded by your officers to the villages similarly circumstanced in the district from which they are unwillingly transferred.

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“(vii) I am glad to observe that you have directed that the Nawab be informed that you expect him to respect existing rights and tenures. I am of opinion that a stipulation to this effect should be inserted in the sanad of grants which I request may be done, and that a copy of the sanad may be forwarded for my information.”

The Government of India, having received from the Nawab the *kharita* above mentioned, considered it unnecessary to alter the sanad which had been already executed. Replying to the despatch of the Government of India on this subject, the Secretary of State, in a despatch dated 9th February, 1863, observed:

“Her Majesty’s Government regret that, in the original grants transferring the several tracts of country, no words were introduced for the maintenance of existing rights in the land; they do not wish you to adopt any other measures for the furtherance of the object in view than such as may be resorted to without giving offence to the respective Chiefs or exciting mistrust in their minds.”

It was subsequently discovered that, owing to similarity of names, an error had occurred in the assessment of villages. To rectify this error, it was proposed that the Nawab should re-transfer to the British Government Piparia and Chakarpur, but should remain in possession as *muafidar* of these villages, which should be subject to the Civil, Criminal and Revenue Regulations in force in British territory; and that in exchange for Piparia and Chakarpur, in Serouli, he should receive Piparia and Bhikampur in pargana Chowmehla. The Nawab assented to these terms in a *khut*, dated 22nd March, 1864, and the arrangement was communicated to the Secretary of State. In a despatch, dated 7th November, 1864, the Secretary of State approved the alterations that had been made; and observed that “the instructions of Government that a territory yielding an annual revenue of between Rs. 1,28,000 to Rs. 1,29,000 be made over to the Nawab in exchange for the pargana of Kashipur were fulfilled.” The despatch continues:



1878 "Under these new arrangements, the Nawab will continue to hold, but only as *muafidar* and subject to British Civil, Criminal, and Revenue Regulations, Piparia and Chakarpur (worth Rs. 1,681) lately made over to him, in full sovereignty, under a misapprehension that they were identical with two villages of the same name..... (iv) Her Majesty's Government are gratified that the Nawab should have again complied with your request involving a small loss to him of revenue and diminution of his jurisdiction. A communication to this effect should be made to His Highness."

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From the year 1860, when Mr. Inglis gave possession to the Nawab, up to the present time, it has not been shown that the British authorities have exercised any administrative or judicial functions in the villages transferred. On the other hand, it is shown that in November, 1862, the Sadr Diwani Adalat, North-Western Provinces, refused to disturb an order of the Judge of Bareilly declining to issue process in execution of a decree of the Privy Council against certain estates of the defendant in this suit, on the ground that they had been transferred from British territory to that of the Nawab of Rampur (1). It has not been denied on the part of the plaintiff that, from the date above mentioned, administrative and judicial functions have been exercised in the transferred villages under no authority than that of the Nawab.

The documents to which we have referred and the admitted facts leave no room for doubt that there has been not merely an assignment of revenue but a transfer of territory. We assent to the argument that in such arrangements we are not to look to documents as operating by their own force to transfer sovereignty—Kent's Commentaries, 10th ed., vol. i, s. 177. We are to look to what was done; though we may consider the language of documents as evidence of what was intended to be done. The circumstance that the arrangement was recorded in a sanad is not incompatible with a cession. It is not inconsistent with usage in this country that a grant of sovereignty or territory by the Paramount Power to a Feudatory should be expressed in a sanad. The East India Company in 1818 entered into a treaty

(1) Misc. R. A. No. 1884 of 1862, decided the 1st November, 1862.

with the Nawab of Bhopal, whereby it was stipulated that the Nawab and his successors, although bound to act in co-operation with the British Government and to acknowledge its supremacy, should remain absolute rulers of their country—Aitchison's Treaties, ed. by Talbot, vol. iii, 370; yet when, as the reward for services in the mutiny, pargana Bairsea was granted to the Bhopal State in sovereignty, the grant was expressed in a sanad—Aitchison's Treaties, ed. by Talbot, vol. iii, 374. So also, treaties had been made with Holkar in 1805 and 1818, but when in 1844 the *guddee* became vacant, intimation of the bestowal of the principality on Maharajah Tookajee and the heirs of his body lawfully begotten was conveyed to him by sanad. Pattiala is the largest of the Sikh States. In recognition of the assistance rendered by the Maharajah during the Nepal war, portions of the Keonthul and Bughut States were conferred on him and his heirs for ever by sanad, dated 20th October, 1815. At the close of the Sikh war, the Maharajah received a sanad, dated 22nd September, 1847, recognising him as entitled to continue in possession of his ancient hereditary estates with all Government rights thereto belonging, of police jurisdiction and collection of revenue, free from any demand of tribute or revenue on the part of the British Government, and it was declared that his chaharumains, feudatories, adherents and dependents would continue bound in their adherence and obligations to the Maharajah as theretofore. Again, in 1860, the British Government gave additional territory to Pattiala, and by sanad declared that His Highness the Maharajah and his heirs for ever, should exercise full sovereignty over his ancestral and acquired domains—Aitchison's Treaties, ed. by Talbot, vol. vi, pp. 65-69.

Nor is it inconsistent with a cession of sovereignty that it should be accompanied by conditions for the benefit of the inhabitants of the ceded territory. Gibraltar and Minorca were ceded to the English in 1713, on condition that the Spanish inhabitants should enjoy their estates and religion—Smollett, vol. ii, p. 97. Upper Assam was, in 1833, ceded to Rajah Poorunder Singh, subject to the payment of an annual tribute, the Maharajah binding himself in the administration of justice to abstain from torture and barbarous punishments which had been practised by former Rajas of Assam.

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The sixth paragraph of the despatch of the 2nd March 1862, above quoted, must be read with the other despatches we have cited, and indeed is explained by the seventh paragraph. The cession to the Nawab was to be accompanied by the stipulation that he was to respect existing rights and tenures. This condition would not, as we have shown, be inconsistent with the cession of territory in sovereignty, and the despatch of the 7th November, 1864, states distinctly that the territory granted had been made over to the Nawab in full sovereignty.

The sanad, as we have said, declares that the territory granted "is annexed to the old territory of the Nawab, to be held on the same conditions as those on which he holds that territory." Unless it can be shown that the old territory is held on conditions incompatible with sovereignty, it does not admit of dispute that the territory made over to the Nawab in 1860 was ceded in sovereignty.

In the course of his address, Mr. Evans conceded that a cession of territory, with rights of sovereignty, could not be made to a mere subject, and therefore the learned counsel for the defendant raised the question as to the status of the Nawab. The Nawab, holding in 1860 no other territory than Rampur, the question as to his status is involved in the conclusion at which we may arrive as to the conditions on which the old territory was held. In determining it, we must not be taken to assent to the learned counsel's position without some qualification. In Coke's Inst., Bk. iv, c. 71, it is mentioned that Henry VI crowned the Earl of Warwick King of Wight: but it is added "we could never find any Letter, Patent for this creation, because, as some do hold, the King could not by law create him a King within his own Kingdom, because there cannot be two Kings of the same place in one Kingdom." Counties Palatine were, however, created within the realm of England, and bestowed on subjects, and in its foreign dependencies the Crown of England has granted to subjects what have been termed proprietary governments "in the nature of feudatory principalities with all the inferior regalities and subordinate powers of legislation." —Broom and Hadley's Commentaries, vol. i, p. 124. Pennsylvania, Delaware, Maryland, and Barbadoes, are cited as instances, and to these may be added Bombay, granted by Charles II in 1669, and

St. Helena, granted by the same King in 1674, to the East India Company. The Governments established by Charter, of which we have had examples in British India, are also instances of the grant by the Sovereign of subordinate sovereignty to private persons, and the history of this country under native rule would, we apprehend, furnish precedents establishing the right of the Paramount Power to elevate subjects to the rank of Fendatories and to assign to them territories. We are, however, relieved of the necessity of determining this point by the conclusion at which we have arrived as to the status of the Nawab.

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The case of *The Charkieh* (1) was cited by Mr. Evans as authorising a Court to consult histories, firmans, treaties, and even replies from the Foreign Office for the elucidation of such questions. The Evidence Act, s. 57, requires Courts in this country to take judicial notice of (*inter alia*) the existence..... of every State or Sovereign recognised by the British Crown, and declares that in such cases and in all matters of public history, the Court may resort for its aid to appropriate books or documents of reference. From such sources, and mainly from the collection of treaties originally published by Mr. Aitchison, the Secretary to the Government of India in the Foreign Department, we have ascertained the following particulars respecting the State of Rampur, and its ruler.

His Highness the Nawab of Rampur claims descent from a Rohilla Chief, Ali Mahomed, who, having rendered service to the Emperor of Delhi in the suppression of the Bara Syuds, received the title of Nawab and a grant of a large territory in Rohilkhand. Owing to intrigues on the part of the Nawab of Oudh, Ali Mahomed was for a time deprived of his territory by Mahomed Shah. But taking advantage of the weakness of the Delhi ruler, Ali Mahomed regained the territory that had been assigned to him, and was confirmed in his possession by the son and successor of Mahomed Shah. In the absence of his elder son detained as a hostage at Delhi, and during the minority of his younger son, Ali Mahomed intrusted his territories to Hafiz Rahmat Khan and Dudi Khan; and on the 13th June, 1872, Hafiz Rahmat Khan

(1) L. R., 4 A. and E., 59.

1878 <hr style="width: 100px; margin: 0;"/> LACHMI NARAIN v. RAJA PARTAB SINGH.	and the other Rohilla Chiefs by treaty entered into an offensive and defensive alliance with the Nawab Wazir Shujah-ul-Dowla. On the division of Ali Mahomed's territory among his sons the Jaghir of Rampur fell to Faizullah Khan. The Nawab Wazir shortly afterwards declared war with the Rohillas, and with the assistance of troops of the East India Company, furnished by Warren Hastings, the Sirdars were defeated and forced to sue for peace.
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By a treaty to which Colonel Champion, the Commander of the Company's forces, was a party, the Nawab Wazir agreed to give Faizullah Khan the country of Rampur, and some other districts dependant thereupon, producing an annual revenue of Rs. 14,75,000: while Faizullah undertook to continue in submission and obedience to the Nawab Wazir, to retain in service no more than 5,000 troops to furnish 3,000 troops to the Nawab if and when required, to enter into no relations with any other power save the Nawab, nor to hold correspondence with any save the Nawab, the English Chiefs excepted. By an agreement dated September 19th, 1781, which recited that by his breach of treaty Faizullah Khan had forfeited the protection of the British Government, and caused by his continuance in his present independent state great alarm and detriment to the Nawab, the Governor-General permitted the Nawab to resume his lands and pay him in money the amount stipulated by the treaty, after deducting the charges, he stood engaged by treaty to furnish. This resumption was not, however, effected. In 1783, Major William Palmer, acting on behalf of the Nawab and "the gentlemen," in consideration of the payment of fifteen lakhs of rupees, released the Nawab Faizullah Khan from the obligation to supply the force of 3,000 men stipulated by the treaty, and in other respects affirm the treaty. On the death of Faizullah, Golan Mahomed Khan murdered his elder brother Mahomed Ali Khan and usurped the Jaghir. The Nawab intervened and being assisted by the British compelled the Rohillas, who had taken up arms to support Gholam Mahomed, to accept terms. What remained of the treasure of the Nawab Faizullah was given over in deposit to the Company. The Nawab Wazir Ausuf-ul-Dowla in December, 1794, by sanad granted to Ahmad Ali Khan, the town of Rampur, producing a revenue of Rs. 10,00,000, and received

from him that treasure deposited with the Company, amounting to Rs. 3,22,000 gold mohars; as a *nazarana* for the jaghir and in lieu of all rights of confiscation of the property of the Nawab Faizullah Khan and Mahomed Ali Khan. The East India Company was a party to, and guaranteed the performance of, these engagements. In 1801 the Nawab Wazir ceded to the East India Company several provinces and, among others, the territory since known as Rohilkhand. No mention of Rampur is made in this treaty; whereas the paramount sovereignty over Farukhabad and its dependencies, which paid an annual tribute of Rs. 4,50,001, is ceded in the following terms: "Farukhabad and others, Rs. 4,50,001."

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It may be noticed that by another treaty made in 1802, the Nawab of Farukhabad ceded the province of Farukhabad and its dependencies to the East India Company in full sovereignty. Rampur, it must be remembered, paid no annual tribute, and possibly on this account was not mentioned in the treaty of 1801. By Regulation XI of 1804, s. 22, certain specified articles exempted from export duty when exported to the territory of the Nawab Wazir, were also exempted from the same duty when exported from the Ceded Provinces to "the territory composing the Jaghir of Rampur;" and in Regulation IX of 1810 the same provision was re-enacted, and it was declared that all goods and articles of trade imported into the Province of Rohilkhand from Rampur Jaghir, being of the description of goods and articles of trade which were liable to the payment of Government customs under that Regulation, should be subject to the payment of the same import duties to which the same goods and articles of trade were subject on importation from the dominions of the Nawab Wazir. These provisions were cited by Mr. Evans to show that the territory of the Jaghir of Rampur was regarded as foreign territory, and on the same footing in respect of trade as the dominions of the Nawab Wazir.

In 1839, the Nawab Ahmad Ali Khan died. The claims of his daughter were set aside, and his cousin Mahomed Syed Khan, having been admitted to the succession, executed an agreement in the form not unusually employed by feudatories, dated 21st August, 1840. It commences as follows: "Agreeably to the orders of the

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Governor-General, the Government of Rampur having develped on me, I therefore declare that all matters connected with my rule shall be conducted with a view to maintain justice, &c., &c.,

From this document, it appears that the Nawab recognised the British Government as having acquired the paramount rights of the Nawab Wazir over the Jaghir of Rampur.

In 1855, Nawab Mahomed Syed Khan was succeeded by his son Nawab Mahomed Yusuf Ali Khan, who, acknowledging that his succession had been sanctioned by the British Government, also executed an agreement declaring he would administer the affairs of the jaghir with justice and equity, and would govern the Pathans with consideration.

In 1862, the Nawab received from the Government a sanad in the following terms, which are identical with the terms of a similar instrument given on the same occasion to the Nizam and other Feudatory Princes :—

“ Her Majesty being desirous that the Governments of the several Princes and Chiefs of India who now govern their own territories should be perpetuated, and that the representation and dignity of their houses should be continued, I hereby, in fulfilment of this desire, convey to you the assurance that, on failure of natural heirs, any succession to the government of your State which may be legitimate according to Mahomedan Law will be upheld. Be assured that nothing shall disturb the engagement thus made to you so long as your house is loyal to the Crown and faithful to the conditions of the treaties, grants, or engagements which record its obligations to the British Government.”

In 1864, certain lands lying within the territory of Rampur, and it is stated at the bar, also lands lying within two of the transferred villages, were required for the purpose of constructing a railroad. The Nawab, in answer to enquiries addressed to him by the Government, North-Western Provinces, replied that he would give up the lands required in full sovereignty, and that duties should not be levied on goods in transit through his territories, but only on goods imported and exposed for sale in his markets.

In 1865, His Highness Nawab Mahomed Kulb Ali Khan Bahadur, on succeeding to the Jaghir, executed an agreement in nearly the same words and to the same effect as the agreement executed by his predecessor in 1855.

Mr. Aitchison estimates the area of Rampur at 1,140 square miles with a population of 507,103 souls. No tribute is paid to the British Government. The Nawab maintains a force of 315 artillery with 23 guns, 505 cavalry, and 977 infantry. He has also a police force of 1,023 men, and regularly constituted Court for the administration of justice.

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The facts to which we have adverted show that the ancestors of the Nawab of Rampur were admitted to treaty engagements with the Nawab Wazir, when that Prince was in all but name independent; that they and His Highness the present Nawab have been recognised by the British Government as in possession of such powers of sovereignty as are enjoyed by the Feudatories of the Empire, and that the State of Rampur has been held by them subject indeed to the extraordinary control of the Paramount Power but otherwise independent.

The learned counsel for the plaintiff contended that such sovereignty was inconsistent with the name "jaghir," which we have seen was applied to the territory before the cession of Rohilkhand, and has since been retained. The etymology of the term is not inconsistent with the sovereignty enjoyed by a Feudatory, though it may be admitted that the term is applied more frequently to tenures which do not partake of sovereignty: but as were declared in *Calvin's Case*, *sæpenumero ubi proprietas verborum attenditur sensus veritatis amittitur*. The circumstances of India in the 18th century were such that the names of forms of government or rulers would afford little indication of their actual sovereignty or attributes. "The conquered rajahs or the appointed subadars, though still professing themselves dependent, had ceased to pay any real obedience or submission to the Mughal. In this distinction between nominal and substantial authority, the state of India might be not inaptly compared to the state at the same period of Germany. According to the ancient forms, the Princes who had long since become independent of the German Emperor, nay who were sometimes hostile to him, still continued in name the humblest of vassals."—Lord Mahon, *History of England*, vol. iv, 427. It would be more than ordinarily dangerous to accept the denomination acquired by a State or a ruler at such a period as affording any certain test of status.



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The learned counsel who represented the Government went on to argue that, if the Court arrived at the conclusion there had been an actual cession and occupation of territory by a foreign Sovereign, the Court need go no further. We understood him to contend that a *de facto* occupation of territory by a foreign Sovereign of itself ousted the jurisdiction of the territorial Courts, and much more so if the occupation had been acquired peaceably and with the acquiescence of the territorial authorities. In support of his argument the learned counsel relied on the rule that persons born during the hostile occupation of territory by a foreign prince are subjects of the foreign prince. It is, however, a condition of this rule that the persons so born should be born of parents who are in obedience, and not hostile to, the foreign power—*Craw v. Ramsay* (1), cited in Forsyth's Constitutional Law, p. 340. "There are three incidents to a subject born: first, that the parents be under the actual obedience of the King; second, that the place of his birth be within the King's dominion; and third, the time of his birth"—*Calvin's Case*, cited in Wheaton, Int. Law, Lawrence's 2nd annotated ed., p. 895. The *de facto* occupation of territory is sufficient for the purpose of constituting allegiance by birth if the parents are in obedience to the power in occupation; but if the parents are not so subject, but hostile, we apprehend the allegiance would be due to the *de jure* prince of the territory. It, however, appears to us that no conclusion can be drawn as to the question before us from the peculiar rules which determine allegiance. The jurisdiction of Courts is not ousted by the inability or the unwillingness of the Executive to assist in the execution of process. The French Courts did not lose their jurisdiction in the territories occupied by the German Army during the late Franco-Prussian War by the mere fact of foreign occupation. Nor would such jurisdiction necessarily be lost if for a season a foreign power was allowed peaceably to occupy territory. At the same time in this, as in other matters, the Courts of Justice would be guided by principles recognized in Municipal Law. They would, we apprehend, infer from a long occupation of territory peaceably enjoyed by a foreign power that there had been a valid cession or such acquiescence as would amount to a valid cession. They could

(1) Vaughan, p. 281.

not, however, draw such inferences from an occupation of a few years, although it had been acquired without the exercise of hostile force and peaceably enjoyed.

We must then proceed to determine whether the transfer was made by authority competent to make a cession. It is contended by the learned counsel for the plaintiff that a valid cession of British territory cannot be made without the sanction of Parliament. On this point it was admitted at the bar that little could be added to the exhaustive arguments of Sir Vernon Harcourt, Sir Fitzjames Stephen, and Mr. Forsyth before the Privy Council at the hearing of *Damodhar Gordhan v. Deoram Kanji* (1), known as the *Bhaunagar Case* and to the observations of the eminent Judges, who, although they did not eventually decide the point, intimated with some distinctness their opinions on the arguments advanced.

It is held by jurists that the authority competent to bind the nation by treaty may alienate the public domain and property by treaty—Kent's Commentaries, 10th ed., vol. i, ss. 165, 166; Wheaton, Int. Law, Lawrence's 2nd annotated ed., pp. 457, 873; and although the opinions of Grotius and Puffendorf differ from the opinion of Vattel on the point, the Lord Chancellor appears to prefer the opinion of the latter writer, that there is no presumption against the power of the Sovereign to alienate without the consent of his subjects. It is declared by writers on Constitutional Law and is established by precedent that the Sovereign of Great Britain is the authority to which is committed the power to make treaties. *Il appent tantum a roy fœdus percutere et bellum indicere*—*Calvin's Case*. "To make leagues and alliances belongs to the King only"—Comyn's Digest, Prerogative, Bk. iii; Stephen's Blackstone, vol. ii, p. 503. At a very early period in Parliamentary history, Sovereigns of England consulted the Parliament in reference to questions of peace and war, and in two instances treaties made by the Sovereign were confirmed by Parliament. A league of mutual assistance made by Henry V with the Emperor Sigismund on the 11th August 1416 was confirmed by Parliament on October 14th, 1416.—Coke's Instit. Bk. iv, c. 26. The treaty of Troyes, whereby England and France were to be united under one King, received the sanction of Parliament on the 21st May 1420—Hallam's

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(1) I. L. R., 1 Bom., 367.

1878 Middle Ages, vol. iii, p. 97. The submission of the latter of these treaties to Parliament (and it will be observed that neither was submitted until after it had been concluded by the Crown) may be explained by the circumstances that it dealt with the Crown and territory of England; but it is more probable it was due, as was perhaps also the submission of the former treaty, to the King's consciousness of the weakness of his title to the Crown and to his frequent need of the subsidies over which the Parliament had then established its control. Coke's Instit., Bk. iv, c. 26, states it to have been one of the charges brought by the Commons against the Duke of Suffolk that he had procured the King to have conference with the French Ambassador in his presence only, without any other of the Council. This was in 1450: again in 1529 of the articles exhibited against Cardinal Wolsey, the 2nd and 3rd charged him with infringing the prerogative of the King in negotiating treaties; but on neither of these occasions was complaint made by any invasion of the functions of Parliament. In 1698-1700 William III negotiated and ratified the "Partition" treaties without communicating them to the Privy Council. It is true Lord Somers was impeached for carrying out the King's instructions with regard to these treaties, but the impeachment fell through and the treaties were not disaffirmed. With the exception of the Treaty of Versailles in 1783, no precedents have been produced to show that in modern times the Crown has sought or received the intervention of Parliament in regard to treaties except in those cases in which it has required the action of Parliament to give effect to the treaty. The Treaty of Versailles, as was pointed out in the Privy Council, stands on a peculiar footing. Its object was to conclude a peace with the American Colonies, whose people had been declared by Parliament rebels, with whom no intercourse was to be maintained, and therefore it was necessary that authority to treat should be given by Parliament.

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It is argued that the Crown cannot of itself cede territory because it cannot release the inhabitants of the territory from their allegiance. But allegiance is correlative with protection: *mutua debet esse domini et subditi connexio, ita quod quantum debet domino ex homagio tantum debet dominus ex dominio.....est reciprocum ligamen, quia sicut subditus tenetur obedire, ita rex regere et protegere—*

Glanville cited *Calvin's Case*. When then the Crown withdraws its rule from territory, and consequently no longer affords protection to the inhabitants of the territory, they are free either to continue their allegiance to their former Sovereign, or to transfer it to the Sovereign who succeeds to the territory. Nor is it necessary that allegiance should be transferred by express submission: its transfer may be accomplished by tacit submission; and tacit submission may be inferred from remaining in the territory under the dominion of the succeeding Sovereign and fulfilling the obligations of subject—Forsyth's Constitutional Law, p. 335.

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It was shown by the instances cited in the Privy Council that the Crown has without the intervention of Parliament ceded territory. Thus by the Treaty of Breda, in 1667, Nova Scotia, then known as Acadia, was restored to France, and Surinam to Holland. By the Treaty of Ryswick, in 1697, a part of the Hudson's Bay territory was ceded to France. It was also shown by the instance of the cession of Florida in 1793 that a cession is not necessarily restricted to territory which has been the subject of conquest or reconquest during the particular war at the end of which it is made.

That the authority to cede enjoyed by the Sovereign is not confined to cessions made to put an end to, or at the close of, was is shown by the instances of the cession of Guadaloupe to Sweden in 1813, and of Sumatra and Bencoolen to the Netherlands in 1824; and we may here observe that Wheaton, in discussing the possession of the rights of cession by the treaty-making authority, admits it to extend to cessions when deemed necessary not for the national safety only, but for "policy"—Wheaton, Int. Law, Lawrence's 2nd annotated ed., p. 873.

It is further shown by the instances of Bencoolen and Florida above mentioned, and of portions of Canada ceded in 1873, that even after Parliament has legislated for a territory, it is competent to the Crown to cede it. As was observed by the Lord Chancellor, the circumstance that territory has been the subject of legislation by Parliament does not take away from the Crown its prerogative of cession. To the instances adduced on this point there may also be added the cession of Nawabganj to the Nawab of Oudh in 1816, inasmuch as that paragana had theretofore formed part of the

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district of Gorakhpur, and, as such, had been the subject of numerous Regulations enacted under the authority of Parliament.

We are not concerned to inquire whether the Crown can without the authority of Parliament cede any portion of the realm of Great Britain and Ireland. The authorities and precedents cited to the Privy Council, and the observations which fell from the eminent and learned members of the Committee in the course of the argument, appear to establish conclusively the prerogative of the Crown to cede territory which does not form part of the realm of Great Britain and Ireland; but it is also to be inferred that, where the inhabitants of a territory have been admitted to a share in the government through the instrumentality of representative institutions, the Crown lies under a moral obligation to consult them through their representative before it proceeds to make a cession of their territory.

Whatever be the extent of the prerogative of cession enjoyed by the Crown in other of its dominions, it is certainly not more restricted in this country.

It is an axiom of English law that, when dominion is acquired by Great Britain in an infidel country already subject to law, the laws of England do not extend to that country: but the laws of the country are to be observed so far as they are not repugnant to the law of God until they are abrogated, and that, where such laws are rejected, a silent recourse is to be had to natural equity—*Calvin's Case*; *Blankard v. Galdy* (1); *Smith v. Brown* (2)—precedents the more noteworthy in that they appear to have influenced legislation for India. The Crown of England having acquired by conquest or cession all the sovereignty or the paramount power in this country obtained, with that sovereignty, the prerogative of cession, which from the nature of its authority had theretofore been exercised by the paramount power without control. The prerogative so acquired has not been curtailed by any legislation.

Furthermore, even before the complete acquisition of paramount sovereignty in India, the Crown had exercised the prerogative of cession by delegation without any intervention or objection on the part of Parliament. By Letters Patent granted in the 13th

(1) Salk. 411.

(2) Salk. 666.

year of Charles II, April 3rd, 1661, the Company thereby incorporated was authorised for the security and protection of their factories and other places of trade in the East Indies to send ships of war, men, and ammunition, and to appoint commanders over them, and to give commanders authority to *continue or make peace or war* with any prince or people that were not Christians, in any place of their trade, to exact reprisals, and to erect castles and fortifications. By Letters Patent issued in the 20th year of Charles II, March 27th, 1689, the Port and Island of Bombay were granted to the Company to be held in free socage as of the Manor of East Greenwich on payment of an annual rent of £10, in the same manner as Maryland had in 1632 been granted by Charles I to Lord Baltimore, to be held in socage as of the Manor of Windsor, he yielding yearly two Indian arrows. In this Charter it was thought necessary to introduce a distinct declaration that the Company should not aliene the territory thereby granted to any Prince Potentate or State or person except such as should be the subjects and of the allegiance of the King. By the same Letters Patent power was given to the Company and to governors to be appointed by them to retain by force of arms possession of the territory thereby granted, and also of any territory they might thereafter acquire in the East Indies.

By Letters Patent granted in the 10th year of William III, September 5th, 1698, the united Company thereby incorporated was empowered to appoint Governors who, under their direction, might raise and muster troops for the defence of their forts, factories, and plantations; and by Letters Patent granted in the 26th year of George II, January 8th, 1753, the Company was empowered to appoint Generals of all the forces belonging to Fort St. George, Bombay, and Fort William respectively, and such Generals were authorised not only to protect by force of arms their respective territories, but upon just cause to invade and destroy the enemies of the same.

But in relation to the question before us by far the most important of the several Charters granted to the Company is the Charter granted by George II in the 31st year of his reign, dated January 14th, 1758. The Letters Patent, after reciting that the Company had been compelled to carry on war against the French

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1878 and likewise against the Nawab of Bengal and other Princes and Governments in India, and that some of their territories and possessions had been taken by the Nawab and afterwards re-taken, empower the Company by any treaty or treaties of peace made or to be made between them and any of the Indian Princes or Governments to "cede, restore or dispose of any fortresses, districts or territories acquired by conquest from any of the said Indian Princes or Governments," or which should be acquired by conquest in time to come.

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It was at the same time provided that the company should not have any power or authority to cede, restore, or dispose of any settlements, fortresses, districts or territories conquered from the subjects or any European power without the special license and approbation of the Crown.

By the Act 13 Geo. 3, c. 63, known as "The Regulating Act," there was committed to the Governor-General and Council of the Presidency of Fort William superintendence and control over the Presidencies of Bombay, Madras and Bencoolen, and in section 9 it was declared unlawful for the President and Council of the last mentioned Presidencies (except in the cases therein excepted) to make any orders for commencing hostilities or declaring or making war against any Indian Princes or Powers or for negotiating or concluding any treaty of peace or other treaty with any such Indian Princes or Powers without the concord and approbation of the Governor-General and Council, and by the same Act the Governor-General and Council were directed to pay due obedience to all orders they might receive from the Board of Directors.

The Act 24 Geo. 3, c. 25, established a Board of Commissioners for the better government of the territorial possessions of the Kingdom in the East Indies. For this purpose the Board was invested with the superintendence and control over the territories and over the affairs of the Company, and with power to direct all acts, operations and concerns which in any wise related to the civil and military government of the territories. It was also enacted that the Commissioners should be furnished with copies of all despatches received by the Directors of the Company and of all despatches proposed to be sent by the Directors to any of their

officers in the East Indies, and that their orders relative thereto should be obeyed by the Directors. The 15th section of the Act empowered the Commissioners, if they considered the subject-matter of their deliberations "concerning the levying of war or making of peace or negotiating with any of the Native Princes or States in India" required secrecy, to send secret orders and instructions to the Secret Committee of the Court of Directors, who were thereupon required to transmit them to the respective Governments and Presidencies, and such Governments and Presidencies were required to obey the orders so conveyed to them.

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By the 34th section of the same Act the Governor-General and Council of Fort William were prohibited (except in the case thereby excepted), without the express command of the Secret Committee of the Court of Directors, either to declare war or commence hostilities or enter into any treaty for making war against any of the countries, Princes or States in India, or any treaty for guaranteeing the possessions of any countries, Princes or States\*\*\* and in all cases where hostilities should be commenced or treaties made the Governor-General and Council were ordered to communicate the same to the Court of Directors by the most expeditious means they could devise.

These provisions were repealed and again enacted by the Act 33 Geo. 3, c. 52, and with some alterations by the Act 3 and 4 Wm. 4, c. 85. From 1734 then up to 1858 the power of cession granted by the Charter of George II was exercised by the Company subject to the control of the Board of Commissioners. But before and during that period it was construed as extending not only to territories acquired directly by conquest but also to territories ceded doubtless in many cases as a consequence of conquest: nor were these cessions made only for the purpose of concluding war or rectifying frontiers, but for the promotion of the policy of the Government.

In 1765 the Nawab Wazir was restored to his dominions with the exception of the district of Corah and Allahabad; and among others he received Gházipur and Benares, of which the Company had obtained a grant from the Emperor.



1878      The districts of Allahabad and Corah were given to the Emperor for the maintenance of his dignity, but on his granting a sanad for Currah and Corah to the Maharattas they were resumed by the Company in 1773 and ceded to the Nawab Wazir. In 1816 the Company, in the name of the British Government, in order to extinguish a debt due by the Government to the Nawab Wazir, ceded to the Nawab the district of Khyraghur and the territory then lately conquered from the Ghurkas, and exchanged pargana Nawabganj, part of the district of Gorakhpore, for pargana Handia.

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In 1782 the city and pargana of Broach was ceded by the Company to Scindiah, in testimony of the sense entertained of the generous conduct manifested by the Maharajah to the Government of Bombay at Wargaoon, and of his humane treatment and release of the British gentlemen who had been delivered to him as hostages on that occasion.

In 1805, at a time of peace, the Company ceded to Scindiah the territories of Gwalior and Gohud, which had been ceded to them by Rajah Umbaji, who had held them as Governor for Scindiah, but had revolted.

In 1806 the Governor-General restored by cession to Raghojee Bhooslah the territories of Sumbulpur and Patna which had been ceded to the Company in 1803.

In 1817 a part of the territory captured from the Rajah of Nipal and ceded to the Company by a treaty of peace was ceded in full sovereignty to the Sikimputti Rajah. In 1833 a portion of Assam was ceded to Rajah Poorunder Singh.

It is unnecessary to refer to the other instances cited in argument in the Privy Council. They are all consistent with the opinion we have expressed as to the exercise of the power of cession by the Company; and inasmuch as the Company acted only in virtue of the authority committed to it by the Crown, they establish the exercise by the Crown of the prerogative of cession in this part of its dominions without any limitation, and without any intervention on the part of Parliament. But it is also important to remember that, notwithstanding the Crown permitted the Company to exercise its prerogative of cession in the East Indies,

it had not divested itself wholly of the prerogative in respect of its Indian dominions. Chandernagore was captured from the French in 1793, and Chinsurah from the Netherlands in 1795. They were administered by the Company and Regulations passed for the establishments of Courts of Justice—Regulations I and XVI of 1805; II of 1808; and IX of 1809. Chinsurah was restored to the Netherlands in pursuance of the treaty made in London on the 13th August 1814, and Chandernagore was restored to the French in accordance with the stipulations of the treaty made in Paris on the 30th May 1814. In pursuance of the treaty signed at Kiel on January 14th, 1814, the town of Serampore and its settlements were restored to the King of Denmark.

In 1824 Bencoolen and the English possessions were ceded to the Netherlands in exchange for establishments on the continent of India and the town and fort of Malacca and its dependencies.

This cession is the more noteworthy in that it was immediately brought to the notice of Parliament that the prerogative of cession had been exercised by the Crown. The treaty was concluded on the 17th March 1824; and on the 24th June 1824 an Act, 5 Geo. 4, c. 108, was passed transferring to the Company the island of Singapore and all the colonies and possessions ceded to His Majesty by the treaty, to be held on the same conditions and subject to the same restrictions as the factory of Bencoolen and the possessions in the island of Sumatra had been held by the Company immediately before the conclusion of the treaty.

The exercise of the prerogative by the Crown concurrently with the Company is established by these instances.

By Act 16 and 17 Vic., c. 95, the territories administered by the Company were continued under their government in trust for the Crown, and they so remained until 1858, when it was deemed expedient they should be governed by and in the name of Her Majesty. Consequently by Act 21 and 22 Vict., c. 106, it was enacted that the government of the territories then in the possession or under the government of the Company, and all powers in relation to government vested in or exercised by the Company, and all territories in the possession or under the government of the Company, and all rights vested in or which, if the Act had not been passed, might have been exercised by the Company in

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We find then that the Crown is competent to cede territory in its Indian dominions without the intervention of Parliament. The prerogative of the Crown is exercised with the advice and through the agency of the responsible ministers of the Crown. In the case before us it is shown that the cession of territory to His Highness the Nawab of Rampur was effected by the Government of India, that it was accepted by the Secretary of State as fulfilling instructions conveyed to the Government of India, and that it was approved by Her Majesty's Government. We have then sufficient evidence of a cession by the Crown: and when it is proved that a cession has been so made, it is not for this Court to inquire whether in the particular instance the exercise of the prerogative was called for.

We therefore find that the nineteen villages which fall within the territory transferred to His Highness the Nawab of Rampur had passed by valid cession out of British territory before the institution of this suit, and that the Court in which the suit was instituted had no jurisdiction to order a sale of those villages.

A decree will pass for the sum found due and for the sale of the remaining villages in satisfaction of the debt and interest due up to the date of realisation, if the debt, interest, and such costs as are decreed be not paid into Court within two months after the date of the decree. The claim to bring to sale the nineteen villages in Rampur is dismissed. The plaintiff accepted the security which he now seeks to enforce many years after the territory had been ceded, and could not therefore claim "benevolence" from the British Government. He must, should his security in British territory prove insufficient, pursue his remedy in the Courts of Rampur, and we doubt not he will receive justice. But inasmuch as the defendant was willing to admit the debt (save in respect of a minor item of interest) and the costs, with the exception of

the stamp-fee, have been incurred chiefly by reason of the plaintiff's contention regarding the jurisdiction of the Bareilly Court, we order that the plaintiff recover the stamp-fee from the defendant, to be realised in the same manner as the debt and interest: and that, in respect of costs other than the institution-fee, each party shall bear his own costs.

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## APPELLATE CRIMINAL.

1878

August 15.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, and Mr. Justice Oldfield.*

EMPRESS OF INDIA v. CHATTAR SINGH AND OTHERS.\*

*Act XLV of 1860 (Penal Code), s. 302—Murder—Sentence—Judgment—Reference to High Court—Act X of 1872 (Criminal Procedure Code), ss. 271, 287, 464.*

*L, C, K, and D conspired to kill S. In pursuance of such conspiracy L first, and then C struck S on the head with a lathi, and S fell to the ground. While S was lying on the ground K and D struck him on the head with their lathis. Held (STUART, C. J., dissenting) that, inasmuch as K and D did not commence the attack on S, and it was doubtful whether S was not dead when they struck him, transportation for life was an adequate punishment for their offence.*

Observations by STUART, C. J., on the impropriety of a judicial officer adding a "note" to his judgment in a criminal case impugning the correctness of the conclusion he has arrived at on the evidence in such case.

On the 6th July 1878, Mr. G. L. Lang, Sessions Judge of Ali-garh, convicted Chattar Singh, Lachman Singh, Kundan Singh, and Dungar Singh, of murder, and sentenced all four persons to death. The Sessions Judge appended the following "note," dated the 10th July 1878, to his judgment in the case:

"In sending up this case to the High Court for confirmation of the sentence or final orders in the case, I feel bound to express a doubt that has arisen in my mind regarding the complicity of Kundan Singh and Dungar Singh in the actual murder of Shere Singh, a doubt that is not supported by the evidence, but by the probabilities of the case.

"There can be no question that Lachman Singh and Chattar Singh actually killed Shere Singh, and that, the alarm being at once given, they fled for their house. That some endeavour was made to

\* Reported under the special orders of the Hon'ble the Chief Justice.

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seize the murderers before they reached their home, I gather from the statements of Gulab and Lachman before the police, as given in the police diaries, an English abstract of which is filed with the proceedings.

"It is possible that Kundan and Dungan were close by, and took part in the rescue of Lachman and Chattar, and being seen in their company immediately after the murder were credited with having taken an active share in the murder.

"It is true that the direct evidence of the eye-witnesses is to the effect that all four of the accused struck Shere Singh, but in this country it is no uncommon thing for the most truthful witnesses to add to their evidence somewhat beyond what they actually saw.

"The very fact that the accused are unable to bring a single witness, true or false, to give evidence in their favour, proves how strong the feeling of the village is against them; and it is therefore not impossible that the case against Kundan and Dungan has been somewhat exaggerated, so as to make them appear equally guilty with Lachman and Chattar.

"It is certainly far more probable that, after Shere Singh had been struck down and the alarm raised, Dungan and Kundan should have helped Chattar and Lachman to get away home, than that they should have wasted their time by returning to batter a dying man.

"Although I have heard it stated out of Court that such were the real facts of the case, no evidence is forthcoming to support it, nor indeed could Kundan himself have made this defence without incriminating his brothers, Chattar and Lachman.

Briefly, as it appears to me possible that the part taken by Dungan and Kundan in this affair may have been somewhat exaggerated, and as it is certain that Shere Singh was actually killed by Lachman and Chattar, I would recommend the revision of the capital sentence in the case of Kundan and Dungan."

Appeals were preferred to the High Court by all four persons.

Mr. *Leach*, for the appellants.

The Court (STUART, C. J., and OLDFIELD, J.) delivered the following judgments:

STUART, C.J.—In this case the Judge, after stating the opinion of the assessors and recording his own judgment, by which he convicted the whole four prisoners of murder and sentenced them to death, has added to his judgment a “note” by which he endeavours to throw doubts on the conclusion at which he had arrived on the evidence. I feel it my duty to state that, in my opinion, this was a most unwarrantable proceeding on the Judge’s part, and that nothing that that note contains can be considered by us in disposing of the question whether the sentence shall be confirmed or not. The reasoning of the note is also such as ought not to be made use of in a criminal case. The Judge states in this note that he feels bound to express a doubt that has arisen in his mind as to the complicity of Kundan and Dungan in the murder, “a doubt that,” he adds, “is not supported by the evidence, but by the probabilities of the case.” The note further states that “it is true that the direct evidence of the eye-witnesses is to the effect that all four of the accused struck Shere Singh,” adding, however, “but in this country it is no uncommon thing for the most truthful witnesses to add to their evidence somewhat beyond what they actually saw,” although in his judgment he refers in terms of strong approval to the evidence of the principal witness for the prosecution, whom he describes as “a respectable-looking old man, who gave his evidence in a straight forward manner that convinced me of the truth of what he said.” The note states further “probabilities,” wholly unsupported by the evidence and I actually find in it the following extraordinary remark: “although I have heard it stated *out of Court* that such were the real facts of the case (that is his probabilities and surmises after the trial) no evidence is forthcoming to support it:” and the note ends with the following conjecture: “as it appears to me *possible* that the part taken by Kundan and Dungan in this affair *may* have been somewhat exaggerated, and as it is *certain* that Shere Singh was *actually* killed by Lachman and Chattar, I would recommend the remission of the capital sentence in the case of Kundan and Dungan.” Now, not a word of this is supported by the evidence, or any portion of it, which was given before the Judge himself at the trial, and I do not see that we are driven to conclude that Shere Singh was actually killed by Lachmah and Chattar. On the contrary, there is evidence suggestive

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of a different state of things. There are other uncalled-for remarks in this note, but I have stated enough to show its improper and unwarrantable character, and to justify me in expressing the hope that such an inadmissible appendage to a criminal record may never be brought before us again.

The facts and circumstances we have to consider appear to be these: The four convicts were all closely related to each other; three of them are brothers, and the fourth is a cousin, and they all lived together in the same enclosure. The deceased was one of the lambardars of the village, and he had on several occasions been obliged, in the discharge of his duty, to oust the accused from their holding; and bad feeling therefore existed between them and the murdered man, or rather on their part against him. As the Judge points out, no less than six different cases or causes of quarrel on this score were stated by Chattar and Lachman before the committing Magistrate, and there can be no doubt of the bitter enmity entertained by these men against the deceased. Nor is there anything in the evidence to show that this enmity was shared more largely by any one of the four than by the others. They appear to have been all actuated by the same ruthless feeling, and to have acted on the night of the murder on a plan preconcerted among them all. This concert and identity of motive will appear from the method and manner of attack upon the deceased, as deposed to by the witnesses for the prosecution, especially Khushali, who is described by the Judge as a respectable, straightforward, and reliable witness. From the evidence thus afforded it appears that on the evening of the 8th June last, at about 9 P.M., Shere Singh was returning from the bazar to his house with the witness Khushali, and they had reached a shop, Shafkat's shop, when the accused Chattar Singh, accompanied by his brother Lachman Singh, came up from behind and struck Shere Singh heavily on his head with a lathi. The blow made Shere Singh stagger, but it was immediately followed by another blow from Lachman Singh, and Shere Singh then fell senseless to the ground, uttering these words—"Rām Rām." Khushali, the witness, cried out when he saw his companion thus assailed, but received a blow from Lachman which appears to have induced him to refrain from further interference. Meanwhile,

from a spot which appears to have been exactly or nearly opposite to that where Shere Singh had just been attacked and felled by Chattar Singh and Lachman Singh, the two other accused, Kundan and Dungar, ran up, also armed with lathis and beat Shere Singh as he lay on the ground, on the head, also, as it would appear. The four murderers then ran off pursued by Aulad Ali, the chaukidar; but the four accused succeeded for the moment in reaching and securing themselves in their house, seeing which Aulad Ali returned and found that Shere Singh was dead. The concert and identity not only of motive but action on the part of the whole four accused is thus shown.

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Nor is it, I think, material, as against the concerted action and equal guilt of the whole four criminals, to consider whether, when Kundan and Dungar came up and added their blows to those of the other two, Shere Singh was then dead or still alive. The impression made upon me on this part of the case is that Shere Singh was alive, and had not then breathed his last, and that in all probability the blows of Kundan and Dungar sealed his fate. On this subject the *post mortem* examination by the Civil Surgeon is very important. It results, in the first place, from this gentleman's report, dated the 9th June, that when Shere Singh was attacked, he was in a natural and healthy condition of body, and when he first saw the body he described it as that of a "healthy-looking man." On examination the Civil Surgeon found "the top of the head smashed in, skull fractured into small pieces, scalp torn, and brain lacerated and protruding." Such being the terrible nature of the violence used against the unfortunate deceased, I scarcely think it reasonable to conclude that such fearful injuries were solely produced by the blows of the two first assailants, Chattar and Lachman; the condition of the head on the contrary indicates that the blows of Kundan and Dungar contributed in no small degree to the frightful state of things deposed to by the Civil Surgeon; and whether the deceased was still alive or already dead when Kundan and Dungar attacked him with their lathis is, in my opinion, immaterial to the question of their guilt. That they believed Shere Singh to be alive when they attacked him I have no doubt whatever, and I do not see that we are compelled by the evidence to conclude that he was then dead. Such



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would also appear to be the opinion formed by the Judge at the trial. For, in summing up the evidence in his judgment, he states that the witnesses for the prosecution "tell the same story, and swear that all four accused deliberately and barbarously murdered Shere Singh; they all say that Chattar struck first, and then Lachman, and that the blows of these two dropped Shere Singh, and that the other two prisoners, Kundan and Dungar, hammered him while on the ground." The Judge further states correctly that "the four accused lay in wait for the deceased, took him unawares, closed in on him, and beat his brains out." I have carefully read the evidence, and have no hesitation in approving this statement of the effect of it. There can indeed be no doubt that this is a correct statement of the effect of the evidence; and it shows, I think, that the whole four accused acted together and participated in the murder, and that they all are equally guilty.

Finding, therefore, that I cannot make any distinction between the two sets of the assailants, I would confirm the sentence of death on them all.

OLDFIELD, J.—Four persons have been convicted of murder, and sentences of death passed upon them and referred for confirmation. In respect of two, Kundan and Dungar, the Judge has added a proceeding, dated four days after he passed judgment, from which it would appear that he subsequently entertained doubts of the guilt of these two prisoners, and he recommends the remission of the capital sentences in their cases.

There can be no doubt of the guilt of Chattar Singh and Lachman Singh, and the evidence points to the conclusion that the attack with intent to murder Shere Singh was premeditated. He had been sitting with Khushali, a witness, at the shop of Bakhshi Chaudhri, and at 8 or 9 P.M. the two were walking homewards, and had arrived opposite the shop of Shafkat, not far off, when they were attacked by Chattar Singh and Lachman Singh. The former struck the first blow of a club, which was at once followed by a blow of a club from Lachman Singh, and the deceased fell to the ground. It then appears that the other two prisoners came up from the opposite direction and struck deceased when

he was down, and that all four ran off to their house not far off, where they appear to have resisted the attempt of the police to arrest them, and their arrest was finally made at 4 A.M.

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There appears to me to be no appreciable difference in the guilt of Chatter Singh and Lachman Singh, and I would confirm the sentences of death passed on them. With regard to Kundan and Dungan, I see no reason to distrust the evidence or to participate in the doubts which appear to have occurred to the Judge after close of the trial, and from reports which he must have picked up out of Court. The Judge admits that these doubts are not supported by the evidence on the record, nor does he inform us that he is in a position, or that the accused are able, to support them by any evidence which is capable of being procured.

On the contrary, the recorded evidence does not appear to be open to distrust. The accusations implicating these two persons were made without any delay by persons who have no interest to accuse them falsely; the statements of the witnesses are consistent; and it is shown that these two prisoners were on or near the spot where the outrage occurred by the substance of their own statements; and that they retreated with the other prisoners to the same house after the crime was perpetrated; and they had equally with the others a motive for the murder. They seem to have joined in a conspiracy with Chatter Singh and Lachman Singh, but they did not begin the attack, and it is doubtful if the death-blows were inflicted by them: for these reasons I would commute the sentence of death passed upon them to transportation for life.

The learned Judge who heard the case differing in opinion as to the proper sentences to be passed on Kundan Singh and Dungan Singh, the case was consequently referred to a third Judge, with reference to the provisions of ss. 271 and 287 of the Criminal Procedure Code.

PEARSON, J.—I concur generally in the view of the case taken by my hon'ble colleague Mr. Justice Oldfield, and am of opinion that the claims of justice will be sufficiently met by the sentences proposed by him.

## APPELLATE CIVIL.

1878

August 16.*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

RAJPATI SINGH (PLAINTIFF) v. RAM SUKHI KUAR (DEFENDANT).\*

*Act VIII of 1871 (Registration Act), ss. 17—cl. (2), 49—Registration, Mortgage.*

The value of the interest created by a mortgage of immoveable property is estimated, for the purposes of the Registration Act of 1871, not by the amount of the principal money thereby secured, but by the amount of such money and the interest payable thereon.

Consequently, a bond dated the 9th August 1873, which charged certain immoveable property with the payment on the 31st May 1874, of Rs. 98, and interest thereon at the rate of one per cent. per mensem, should have been registered. *Darshan Singh v. Hanwanta* (1) followed. *Nanabin Lakshman v. Anant Babaji* (2) differed from (3).

THIS was a suit to recover Rs. 98, the principal money due on a bond dated the 9th August 1873, which charged certain immoveable property with the payment on the 31st May 1874, of such money together with interest thereon at the rate of one per cent. per mensem, the suit being instituted on the 26th May 1877. The defendant set up as a defence to the suit that the bond operated to create an interest in immoveable property of the value of upwards of Rs. 100, and its registration was therefore compulsory, and being unregistered it could not affect the property comprised in it. The Court of first instance held that, as the plaintiff only claimed to enforce his lien on the property in respect of a sum under Rs. 100, the fact of the bond not being registered did not bar his claim under it. On appeal by the defendant the lower Appellate Court held that the bond could not affect the immoveable property comprised in it, inasmuch as it created an interest in the property of the value of upwards of Rs. 100, and was nevertheless unregistered.

The plaintiff appealed to the High Court, contending that the claim was maintainable, notwithstanding that the bond was not registered, inasmuch as he sought to enforce a lien on the property comprised in the bond to the extent of Rs. 98 only.

\* Second appeal, No. 509 of 1878, from a decree of Hakim Rahat Ali, Subordinate Judge of Ghazipur, dated the 7th March 1878, reversing a decree of Mirza Kamr-ud-din Husain, Munsif of Ballia, dated the 1st August 1877.

(1) I. L. R., 1 All., 374.

(2) I. L. R., 2 Bom., 353.

(3) See also *contra*, *Narasayya Chetti v.*

*Guruvappa Chetti*, I. L. R., 1 Mad., 378.

Munshi Sukh Ram and Lala Lalla Prasad, for the appellant.

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Babu Barodha Prasad, for the respondent.

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The judgment of the Court was delivered by

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PEARSON, J.—The bond in suit, in reference to the ruling of this Court in *Darshan Singh v. Hanwanta* (1) and other similar rulings in similar cases, undoubtedly required to be registered, and under s. 49 of Act VIII of 1871, cannot affect the property therein comprised, being immoveable property. We disallow the pleas in appeal, and dismiss the appeal with costs.

*Appeal dismissed.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.*

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*August 22.*

GAURI DAT AND OTHERS (DEFENDANTS) v. GUR SAHAI (PLAINTIFF) AND RUK-MIN KUAR AND ANOTHER (DEFENDANTS).\*

*Hindu Law—Alienation—Reversioner—Fraud.*

S was entitled under the Mitakshara law, to succeed, on the death of M, her mother, to the real estate of N, her father. Certain persons disputed S's right of succession and claimed that they were entitled to succeed to N's estate on M's death, and complained that M was wasting the estate. The differences between such persons and M and N were referred by them to arbitration, and an award was made and filed in Court which, among other things, partitioned the estate between S and such persons. G, who claimed the right to the estate on S's death, sued for the cancellation of the award on the ground that it was fraudulent and affected his reversionary interests. *Held*, relying on *Dowar v. Boonda* (1), that the suit was maintainable notwithstanding that G was not the next reversioner.

THIS was a suit for the cancellation of an award made on a reference to arbitration. The facts of the case were as follows: One Tek Chand, deceased, had by his first wife three sons, Dario Singh, Nand Lal, and Sidh Gopal, and his second wife one son, Sheo Prasad. On the death of Tek Chand the four brothers separated, and a partition of the family estate took place. Dario Singh died leaving two sons, who died leaving each a son, the son

\* First Appeal No. 124 of 1877, from a decree of Babu Ram Kali Chaudhri Subordinate Judge of Cawnpore, dated the 3rd September, 1877.

(1) I. L. R., 1 All., 274.

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of one being Gur Sahai, the plaintiff in the present suit, and of the other Raja Ram, a minor. Nand Lal died in September, 1863, leaving a widow, Rukmin Kuar, a defendant in the present suit, and a daughter, Sitala Kuar, also a defendant in the present suit, who had six daughters, one of whom had male issue. Sidh Gopal died leaving a daughter. Sheo Prasad died leaving six sons, of whom five, *viz*, Har Dat, Gauri Dat, Ambika Dat, Din Dayal, and Sheo Dat, were defendants in the present suit. The sixth son Prag Dat died leaving two sons, Ram Dayal and Sankata Din, also defendants in the present suit. After the death of Nand Lal differences arose between the heirs of Sheo Prasad on the one side and Rukmin Kuar and Sitala Kuar on the other side with regard to the estate of Nand Lal. The heirs of Sheo Prasad asserted that they were the reversioners to such estate, and Rukmin Kuar was wasting it, while Sitala Kuar asserted that she was her father's heir, and entitled to succeed to the property on Rukmin Kuar's death. The parties, by an instrument in writing dated the 18th August, 1876, agreed to refer the differences between them to arbitration. In pursuance of this agreement an award was made which, after reciting that it was made in order to protect the property, to perpetuate the name of the ancestor, and to perform ceremonies for the spiritual benefit of the deceased (Nand Lal), disposed of all the estate of Nand Lal between the parties to the arbitration.

On an application made by Sitala Kuar, this award was ordered to be filed in Court by the Subordinate Judge. The heirs of Sheo Prasad subsequently obtained possession from the Court of the property awarded to them. The present suit was brought by Gur Sahai, a son of Dario Singh, and a grandson of Tek Chand, as a reversioner to the estate of Nand Lal, against Rukmin Kuar, Sitala Kuar, and the heirs of Sheo Prasad for cancellation of the award as being fraudulent and injurious to his rights as such reversioner.

On the 7th June, 1877, the plaintiff and the defendants Rukmin Kuar and Sitala Kuar filed an agreement in Court, in which these defendants agreed that a decree should be made against them in

the plaintiff's favour, the plaintiff on his part agreeing that, in respect of a certain portion of the property awarded to Sitala Kuar, he would not at any time seek to disturb her possession. It was also stated in this agreement that "the plaintiff is the nearest heir to the estate of the deceased Nand Lal, the husband of petitioner Rukmin Kuar." On the 24th July, 1877, the heirs of Sheo Prasad filed a written statement in which (amongst other things) they urged that the plaintiff was not the next reversioner after Rukmin Kuar, and consequently no cause of action had accrued in his favour.

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The Subordinate Judge fixed two issues for trial, *viz.*, (i) "Whether the plaintiff is the next reversioner after Rukmin Kuar: if not, has he any cause of action?" and (ii) "Whether the plaintiff is entitled to set aside the arbitration-award in dispute?" On the first issue the Subordinate Judge held that, as Sitala Kuar, the heir to the estate of Nand Lal had no sons, and as the parents and brothers of Nand Lal were dead, the plaintiff was, under the Mitakshara law, reversioner to the estate of Nand Lal on Sitala Kuar's death; and that as the plaintiff's right as such reversioner was affected by the award, and Sitala Kuar, the heir to the estate, raised no objection to the plaintiff's suit, the plaintiff had a cause of action. On the second issue the Judge held that the plaintiff was entitled to have the award cancelled, as it plainly affected his reversionary rights, and he accordingly gave the plaintiff a decree cancelling the award.

The heirs of Sheo Prasad appealed to the High Court, contending in their memorandum of appeal that the award was valid for the lives of Rukmin Kuar and Sitala Kuar and as between them, and that as the arrangements effected under the award were intended to save the estate from the consequences of a debt incurred for the benefit of the soul of Nand Lal, such arrangements were legal and ought to stand good.

Mr. Conlan and Maulvi Obeidul Rahman, for the appellants.

Pundit Ajudhia Nath for Gauri Dat, respondent, and Pandits Bishambhar Nath and Nand Lal for Rukmin Kuar and Sitala Kuar, respondents.

1887      Mr. Conlan contended that the plaintiff could not maintain the suit not being the next reversioner to the estate. He referred to GAURI DAT v. GUR SAHAI *Dabee Saradaprosaud Mookerjee* cited in Norton's Leading Cases on the Hindu Law of Inheritance, ed. by Scharlieb, part ii, p. 628 and following pages; and to the Tagore Law Lectures, 1870, pp. 201, 202.

Pandit Bishambar Nath relied on *Dowar v. Boonda* (1) and *Ammur Singh v. Murdun Singh* (2).

The following judgments were delivered by the Court:

STUART, C.J.— The suit in which this appeal has arisen was instituted by the plaintiff Gur Sahai alone against Rukmin Kuar; her daughter Sitala Kuar, and other persons, descendants of Sheo Prasad, deceased, a male relative of Nand Lal, Rukmin Kuar's husband. During the pendency of this suit an arrangement appears to have been come to between the two ladies, defendants, and the plaintiff to the effect that he would not in future make any claim in disturbance of, or in opposition to, the arbitration award so far as it allotted property to Sitala Kuar, and that with that exception he, the plaintiff, would have a decree in his favour; and in looking into the record I find that such an arrangement or compromise, under the name of a petition of cognovit, was filed, and it bears the plaintiff's signature. The petition was sent for attestation to the Munsif of Fatehpur, who got it attested, and reported that the ladies expressed their consent; and there was thus an end to the dispute between them and the plaintiff. But the other defendants, the descendants of Sheo Prasad, being dissatisfied with the judgment of the Subordinate Judge, have preferred the present appeal, the form of which is thus explained, the respondent being not only the plaintiff but the two ladies with them.

The compromise between these parties, however, does not affect the legal question raised by the appeal before us. It has been argued at great length on both sides, and numerous authorities have been referred to, but the case is a very simple one. The plaintiff seeks to set aside an arbitration award made between the two ladies Rukmin Kuar and her daughter Sitala Kuar on the one side, and

(1) H. C. R., N.-W. P., F. B. Rulings, 56.

(2) H. C. R., N.-W. P., 1870, p. 31.

the defendants Ram Dayal and other descendants of the deceased Sheo Prasad, on the other side, and the award disposed of the whole property in suit among these defendants themselves to the prejudice of the plaintiff and in disregard of his reversionary right. The Subordinate Judge has given the plaintiff a decree, holding that according to the law of Mitakshara he has the reversion to the estate after Sitala Kuar.

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In support of the present appeal it was argued by the counsel for the appellants that the plaintiff had no such reversionary right as would enable him to maintain the suit, as his interest was too remote, and the learned counsel referred to several authorities in support of that contention. But it is unnecessary for us to examine these, seeing that the appellants themselves in their written statement admit the reversionary right of the plaintiff, and that being so, the only question is whether he can as such reversioner maintain the present suit to have the award set aside. Undoubtedly he can.

The pleaders for the respondents refer to a judgment of the Full Bench of this Court, delivered on the 12th September, 1866, in the case of *Dowar Rai v. Boonda* (1) in support of the plaintiff's right to maintain his suit against the defendants, appellants, and so far as it goes, that case clearly supports the plaintiff's right of suit. I was not a Judge of the Court when the judgment of the Full Bench was delivered, but I have carefully considered it, and I fully concur in its ruling. But irrespective of it and on principle, the plaintiff, although not the immediate next reversioner, has clearly a right to protect such interest as he has in the estate, and for that purpose to maintain such a suit as the present, for his right of reversion is of such a nature, according to Hindu law, that it cannot be defeated should he survive Sitala Kuar.

The judgment of the Subordinate Judge is therefore right, and the present appeal is dismissed with costs.

PEARSON, J.—The pleas set forth in the memorandum of appeal do not appear to have much weight. The award which the plaintiff sues to set aside has absolutely disposed of the property in suit in such a manner as to destroy his reversionary interest therein, which cannot be protected without or otherwise than by avoiding

(1) H. C. R., N.-W. P., F. B. Rulings, 56.



1878 the award *in toto*. Nor can it be admitted that no other arrangement  
 GAURI DAT than that made by the arbitrators for the discharge of the debts due  
 v. from the estate of Nand Lal, or incurred for the benefit of his soul  
 GUR SAHAL. was possible.

These pleas were not indeed pressed upon us orally. The learned counsel mainly urged that the plaintiff not being the next reversioner, is incompetent to bring this suit. It is true that Sitala Kuar is the next reversioner on the death of her mother Rukmin Kuar, the present incumbent. But the plaintiff alleges that these ladies have colluded with the defendants, appellants, in the matter of the award with the view of defrauding him. The suit is therefore maintainable under the authority of the Full Bench ruling of this Court, in the case of *Dowar Rai v. Boonda* (1). The learned counsel impugns that ruling, but we are bound by it.

He further contended that Sitala Kuar would take her father's estate after her mother's death in full proprietary tenure, so as to be able to dispose of it absolutely, and that therefore the result of the arbitration to which she had consented was not obnoxious to objection on the part of the plaintiff. Were the contention sound he would not be the reversioner after her, and would of course have no *locus standi* in this suit; but the contention is opposed to Hindu law prevailing in these parts, and is indeed inconsistent with the pleading in the last paragraph of the written statement filed by the defendants (appellants here) in the Court below, wherein they admitted the plaintiff to be the next reversioner after the female defendants to a moiety at least of the property in suit. I would dismiss the appeal with costs.

*Appeal dismissed.*

1878  
 August 22.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

RAM GHULAM (DEFENDANT) v. CHOTEY LAL (PLAINTIFF). \*

*Contract of sale—Suit to enforce registration of conveyance—Act III of 1877 (Registration Act), ss. 36, 75, 77.*

*Held*, where a person had agreed to sell another certain immoveable property, and had conveyed the same to him by a deed of sale which under the Registration

\* Second Appeal, No. 113 of 1878, from a decree of R. F. Saunders, Esq., Judge of Farnkhabad, dated the 2nd January, 1878, reversing a decree of Maulvi Muhammad Abdul Basit Khan, Munsif of Chibramau, dated the 10th December, 1877.

(1) H. C. R., N.-W. P., F. B. Rulings, 56.

Act of 1877, required registration, and the vendor refused to register such deed, that it was not incumbent on the vendee to take steps under that Act to compel the vendor to register before he sought relief in the Civil Court, but that he was at liberty without doing so to sue the vendor in the Civil Court for the registration of such deed.

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THE plaintiff in this suit claimed the registration by the defendant of a deed of sale and possession of the property conveyed by such deed. He alleged in his plaint that the defendant had agreed to sell a certain dwelling-house to him, and had on the 31st October, 1877, conveyed the same to him by a deed of sale, and had received a portion of the purchase-money, but that the defendant refused to register the deed of sale or to receive the balance of the purchase-money, and that he, the plaintiff, was ready and willing to pay the balance of the purchase-money. The defendant denied the execution of the deed of sale and the receipt of any portion of the purchase-money, and further pleaded that the suit was not maintainable.

It appeared that the defendant had presented the deed of sale to the Sub-Registrar for registration, but not at a proper time, and that the deed had been returned with a direction to present it at a proper time, and that he afterwards refused to obtain registration of the deed.

The Munsif held that the suit was not maintainable, on the ground that the plaintiff should have compelled the defendant to appear at the registration office, under the provisions of s. 36 of the Registration Act of 1877, and in case the defendant had denied the execution of the deed of sale, and the Sub-Registrar had refused to register it, have applied to the Registrar under s. 75 of that Act to establish his right to have the document registered, and in case the Registrar had refused to order the sale-deed to be registered, and not till then, have instituted a suit in the Civil Court under s. 77 of the same Act, for a decree directing the document to be registered.

On appeal by the plaintiff the District Judge held that it was impossible for the plaintiff, under the circumstances of the case, to have obtained relief otherwise than by the present suit, and finding that the defendant had executed the deed of sale, gave the

1878 plaintiff a decree directing its registration and for possession of the property.

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v.  
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On second appeal by the defendant to the High Court it was again contended by him that the suit was not maintainable, for the reasons stated by the Munsif.

Munshi *Sukh Ram*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The following judgments were delivered by the Court:

STUART, C.J.—The order of the Judge is right, and this appeal must be dismissed. The sections of the Registration Act relied on by the Munsif are merely permissive, and do not exclude such a suit as the present for the enforcement of the contract of sale, which includes the obligation to register the deed. The appeal is dismissed with costs.

OLDFIELD, J.—This is a suit for the specific performance of a sale-contract by completion of the deed and its registration and delivery to plaintiff and possession of the property.

The pleas in special appeal fail, as there is nothing in the Registration Act to bar a suit of this kind, or to prevent a Civil Court directing the defendant to register the deed. The deed was never properly presented to the Sub-Registrar, nor was there refusal to register on his part, which could bring into operation the provisions of chapter XII of the Registration Act, and give plaintiff his remedy by appeal for an order of refusal to register rather than by a suit; and supposing that it was in the power of plaintiff to have applied under s. 36 to the registering officer to summon the defendant in order that the deed might be registered, there is nothing in that circumstance which can prevent his remedy by a regular suit for the specific performance of the sale contract, including an order to the defendant to complete the same by registration.

The pleas fail, and the appeal is dismissed with costs. The plaintiff will have a decree directing that he pay into the lower Appellate Court Rs. 250, the balance of the purchase-money, if not already paid into the Court, within one week from the date of

this decree, and thereupon the defendant shall execute a deed of sale of the property in suit, cause registration and delivery of the same, and put the plaintiff in possession of the property sold, and defendant shall then receive the balance of the purchase money. 1878  
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*Appeal dismissed.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

LALA AND ANOTHER (DEFENDANTS) v. HIRA SINGH AND OTHERS (PLAINTIFFS).\*

1878  
*August 22.*

*Cess—Custom—Act XIX of 1873 (N. W. P., Land Revenue Act), s. 66.*

A cess leviable in accordance with village custom which is not recorded under the general or special sanction of the Local Government cannot, under s. 66 of Act XIX of 1873, be enforced in a Civil Court.

A custom to be valid must be ancient, must have been continued and acquiesced in, and must be reasonable and certain.

The fact that a cess leviable in accordance with village custom has been recorded by a settlement officer is important evidence of the custom, but not conclusive proof of it.

*Held*, on the evidence in this case, that the village custom set up was not established.

THIS was a second appeal in a suit in which the plaintiffs, zamindars of the village of Nurpur, claimed from the defendants Rs. 5 as the cess leviable in accordance with the custom of the village on the second marriage of a widow of the Ramaiya caste. The defendants belonged to the Ramaiya caste and resided in Nurpur. The defendant Lala had married the second defendant, who was a widow at the time of the marriage. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Spankie*, for the appellants, contended that the suit was not maintainable as the cess, although recorded in the administration paper of the village by the settlement officer, had not been recorded with the sanction of Government—s. 66 of Act XIX of 1873; that the custom was not proved, that it was bad by reason of not being ancient, not having been continued, not having been acquiesced in, and not being reasonable and certain, and further by reason of its being in restraint of the marriage of a Hindu widow,

\* Second Appeal. No. 475 of 1878, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 27th February, 1878, reversing a decree of Pandit Ratan Lal, Munsif of Bijnor, dated the 22nd September, 1877.

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which the law sanctioned. He referred to *Hurpurshad v. Shoo Dyal* (1); Broom's Commentaries on the Common Law, ed. of 1856, p. 12 and the following pages; s. 26 of Act IX of 1872; and Act XV of 1856.

Babu *Ratan Chand*, for the respondents.

The following judgments were delivered by the Court :

OLDFIELD, J.—The plaintiffs sue as zamindars of Nurpur to recover Rs. 5, a sum which they assert they have a right to levy on occasion of a second marriage of a widow of the Ramaiya caste, resident in their village, from the person who marries the widow. Both husband and wife have been made defendants, and plaintiffs rest the claim on ancient custom, and support it by an entry in the administration-paper of the village drawn up in 1872, in course of the current settlement, and by other evidence. The Court of first instance dismissed the suit, holding that the evidence was insufficient to establish the right by custom, and that the administration-paper could not bind those who were no parties to it. The Judge has held that the custom has been established, and he considers that the fact that the cess was entered in the settlement record is a sufficient fulfilment of the provisions of s. 66 of Act XIX of 1873, and he appears further to consider that this Act is not applicable to the case, as the administration-paper was prepared before it came into operation.

The defendant has appealed on several grounds, and without dealing with all, I am of opinion that the decision of the Judge cannot be affirmed, because the cess here claimed is not one which the law permits to be enforced in a Civil Court, and because no right by custom has been established, the Judge having failed to rightly appreciate the nature of the evidence necessary to establish a custom.

The settlement administration-paper drawn up in 1872 contains an entry detailing certain cesses which the zamindars have a right to levy from artizans, and among them is an entry that a sum of Rs. 5 is leviable as a zamindari due from the caste Ramaiya on occasion of "karao" or second marriages by widows. It is necessary for the validity of all such cesses that they be recorded at the time of settlement and sanctioned by Government. In the case before

(1) L. R., 3 Ind. App. 259, see p. 285.

us the settlement of the mauza had been commenced, and the record which contains the entry of the cess had been drawn up while Regulation VII of 1822 was in force, but with reference to ss. 2 and 37 of Act XIX of 1873, the settlement then in progress was brought under the operation of Act XIX of 1873, which is now the law in force, and it is essential to see whether those conditions which give validity to a cess under Act XIX of 1873 have been fulfilled in this case. The second paragraph of s. 66 of Act XIX of 1873 applies to the cess in question, and by it a condition for its validity is not only that the cess be recorded by the settlement officer, but that it be recorded after special or general sanction by the Local Government. But there is no evidence of any such sanction, nor has the settlement, as we understand, received the final confirmation of Government. Any presumption there might be in favour of the entry of the cess having been made by the settlement officer after sanction had been obtained, is weakened in this case by the consideration that the record was drawn up before the new law came into force, which has particularly required that sanction to these cesses be obtained prior to recording them. The claim is therefore not maintainable with reference to s. 66 of Act XIX of 1873.

Amongst the conditions essential for establishing a custom are that the custom is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable, and is certain and not indefinite in its character. To support the custom in this case we have only the evidence of three witnesses. One of them is styled the head of the Ramaiya caste, who is said to be entitled to a part of the cess; another is the plaintiff's family priest; another the patwari; it is obvious that their evidence should be received with caution, as they appear to have reasons for supporting the plaintiffs' but accepting what they say, it is clear that no custom has been established, and that any payments hitherto made, have been exceptional and voluntary.

Bhagwan Das, patwari, says that before the administration-paper was drawn up in 1872, by which the cess was fixed at Rs. 5, every one paid according to his means, and that there have been five marriages of the kind in 1875, and no cess has been paid, but it was disputed in all.

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Nilapat, the priest, can only say, in a general way, that the cess is paid, but he allows none has been paid for the last two years; and Hira, who styles himself the headman of the Ramaiya caste, and claims a cess for himself, admits that he has never realised the cess hitherto. Nor is it clearly shown from what particular person the cess is claimable. No right by custom can be established on the above evidence, and the plaintiffs' case is not assisted by two decrees, which he files to show that the cess has been decreed.

With reference to the entry in the administration-paper, no doubt the proceedings before the settlement officer recording a custom are to be received as important evidence, but they must be weighed against evidence on the other side, and their value has to be properly appreciated. In the case before us, the entry is entitled to little weight, for not only is it not shown that it was recorded as the law requires, but it appears for the first time in the record of the tenth settlement in 1872, and it was made manifestly in the interest of particular parties, with a view to establish claims against persons who have not been shown to have been parties to the proceedings, for although the record purports to be attested by Umer, as headman of the Ramaiya caste, he was himself interested in having such a cess recorded, and his authority to represent the caste has not been shown.

It is unnecessary to deal with the other pleas in appeal, as for the above reasons, I am of opinion that the claim is not maintainable, and I would reverse the decree of the Judge and dismiss the suit with costs.

STUART, C.J.—I entirely concur in and approve the view taken of this case by Mr. Justice Oldfield. I would only wish to add a remark on a point which was wrongly insisted on at the hearing by the counsel for the appellant, namely, that the alleged custom, even if proved, was opposed to public policy which favours marriage. But in my opinion that is a consideration derived from the judgments of English Courts which is not applicable to a case like the present. In other respects I agree with Mr. Justice Oldfield. The appeal is allowed, the decree of the Judge reversed, and the suit dismissed with costs in all the Courts.

*Appeal allowed.*

## APPELLATE CRIMINAL.

*Before Sir Robert Stuart, Kt., Chief Justice.*EMPRESS OF INDIA *v.* NADUA.\*1878  
August 26.

*Appeal by person convicted by Deputy Commissioner invested under s. 36 of Act X of 1872 (Criminal Procedure Code)—Act X of 1872 (Criminal Procedure Code), ss. 270 271—High Court.*

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INDIA  
*v.*  
NADUA.

*Quære*—Whether, where a person has been convicted by a Deputy Commissioner invested under s. 36 of Act X of 1872, and sentenced to a term of imprisonment requiring under that section to be confirmed by the Sessions Judge to which such Deputy Commissioner is subordinate, and such sentence has been confirmed accordingly, an appeal lies to the High Court against such conviction and sentence.

On the 17th June, 1878, one Nadua was convicted of a certain offence by Mr. J. Liston, Deputy Commissioner of Lalitpur, invested with the powers mentioned in s. 36 of the Code of Criminal Procedure, and was sentenced by the Deputy Commissioner to rigorous imprisonment for four years. This sentence was, in accordance with the provisions of the same section of the Code, on the 26th June, 1878, confirmed by Mr. H. B. Webster, Commissioner of Jhānsi, and the Sessions Judge to whom the Deputy Commissioner of Lalitpur was subordinate.

On the 26th July, 1878, Nadua appealed to the High Court.

The following judgment was delivered by the Court:

STUART, C.J.—I doubt very much whether this appeal lies. The original trial took place before Mr. Liston, the Deputy Commissioner of Jhānsi, and, as directed by s. 36 of the Criminal Procedure Code, the sentence was confirmed by Mr. Webster, the Commissioner, who, by Resolution of the Government, North-Western Provinces, of 1862, has the powers of a Sessions Judge, and to whom Mr. Liston is subordinate. But neither s. 36 nor any other provision of the chapter, ch. IV, of which it forms part, contains anything respecting an appeal from such a conviction and sentence to this Court.

By s. 270 of the Code it is provided that any person convicted on a trial held by an officer invested with the powers described in s. 36 may appeal to the High Court, but that no appeal in such case shall lie to the Court of Session. This would apply to the present case if the procedure had stopped with the trial before

\* Reported under the special orders of the Hon'ble the Chief Justice.



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Mr. Liston, the Deputy Commissioner ; but the peculiarity is that here the sentence was confirmed by the Commissioner, as it had to be by law, and it would seem anomalous to allow an appeal to the High Court from a conviction and sentence by an inferior Court like that of a Deputy Commissioner over the head of, and in fact ignoring what had been done by, the superior officer, the Commissioner. The last provision of s. 270 allows a sentence of an Assistant Sessions Judge to be appealed to the High Court, a provision which has obviously no application to such a case as this.

The only other section respecting appeals to the High Court on convictions on a criminal trial is s. 271, which provides that any person convicted on a trial held by a Sessions Judge may appeal to the High Court. But neither does this section apply to a case like the present, for here the trial was not by the Sessions Judge, but an inferior officer, and the Commissioner, who no doubt had the powers of a Sessions Judge, simply confirmed the sentence.

Under these circumstances I would have felt disposed to refer the case to a Full Bench with the question whether the appeal to this Court lies. But it would appear that the practice of this Court has been to entertain these appeals whether the sentence was confirmed by the Sessions Judge or not, and a list of cases, going over a period of three years, has been supplied me by the Office in which the appeals were entertained and apparently without objection. No such cases have come before myself, and the question does not appear to have been raised before any other Judge, the validity of the appeal having apparently been assumed. For myself I confess that I doubt the legality of the procedure. It may have been intended to allow an appeal to this Court in such a case as the present, but that intention does not in my opinion appear from the sections of the Code of Procedure to which I have referred. In deference, however, to the practice of the Court, or such practice as the Court has, tacitly at least, sanctioned, I refrain from making any order calling it in question, especially as such practice is on the side of the right of appeal in a criminal case, which I consider ought always, if possible, to be favoured.

In the present case the appeal is dismissed and the conviction and sentence affirmed.

*Appeal dismissed.*

## APPELLATE CIVIL.

1878  
August 22.*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.*

RAYNOR (PLAINTIFF) v. THE MUSSOORIE BANK (DEFENDANT).\*

*Will Construction—Precatory Trust.*

*W. R.* by his will left to his wife, *M. A. R.*, the whole of his property in the confidence that she would act justly to their children in dividing the same when no longer required by her. *M. A. R.*, by her will, left to their children certain portions of such property, leaving to their child *A. C. R.*, amongst other things, certain banking shares. These were attached in the execution of a decree against the executors to her estate as belonging to such estate. Held that she took under her husband's will a life-interest only in his property, with a power of appointment in favour of the children, and that the shares belonged to *A. C. R.* and could not be sold in execution of the decree as part of the estate of *M. A. R.*

THIS was a suit to establish the plaintiff's right as proprietor to twenty-four shares in the Delhi and London Bank, Limited. The facts of the case, so far as they are material for the purposes of this report, were as follows: The shares had been attached in the execution of a decree obtained by the Mussoorie Bank against the executors to the estate of one Mary Anne Raynor as belonging to her estate. The plaintiff had objected to the attachment, claiming the shares as his own property, but his claim was disallowed. The shares had originally belonged to William Raynor, the husband of Mary Anne Raynor. William Raynor, by his will, made on the 23rd March 1859, gave and bequeathed the whole of his property including these shares to his wife, saying that he did so "feeling confident that she would act justly to their children in dividing the same when no longer required by her." By her will, made on the 5th September 1868, Mary Anne Raynor gave certain property to each of her children, giving the plaintiff in this suit, amongst other property, the shares in suit.

The plaintiff contended that William Raynor had, by the words he had used in his will, created a trust for the benefit of his wife during her life, and after her death for his children, and that the shares were consequently not liable to be sold in the execution of a decree against the executors of Mrs. Raynor's estate as portion of her estate. The Court of first instance held that there was an absolute

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\* First Appeal No. 89 of 1878, from a decree of F. Bullock, Esq., Subordinate Judge of Dehra Dun, dated the 10th May 1878.

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gift to Mrs. Raynor of everything her husband possessed, and that no trust was created for the benefit of the children, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court, raising the same contention as had been raised in the Court below.

*Messrs. Howard and Hill* for the appellant.

*Mr. Quarry* for the respondent.

The following authorities were referred to at the hearing :

*Curnick v. Tucker* (1); *Le Marchant v. Le Marchant* (2); *Knight v. Knight* (3 Beav., 172, S.C., 11 G. and F. 513) cited in *Tudor's Leading Cases in Equity*, 4th ed., vol. ii, p. 949; *Jarman on Wills*, 3rd ed., vol. i, p. 356; and *Fox v. Fox* (27 Beav., 301) cited in *Lewin on Trusts*, 6 ed., p. 121.

The material portions of the judgments delivered by the Court were as follows :

STUART, C.J.—I am clearly of opinion that the Subordinate Judge is wrong and that this appeal must be allowed. The portion of the will material for the question before us is as follows : “I give to my dearly beloved wife Mary Anne Raynor the whole of my property, both real and personal, including my Government promissory notes, Delhi Bank shares, my house at Firozpur, No. 50, together with all my plate and platedware, and whatever money, furniture, carriages, horses, &c., may be in my possession at the time of my decease, together with all monies due or which may afterwards become due, *feeling confident that she will act justly to our children in dividing the same when no longer required by her.* These last words undoubtedly create a trust in Mrs. Raynor for the benefit of her children, and limit her own estate in the property to a mere life-interest, or to the income of the property so long as she may require it. The testator feels confident that his wife will “act justly” to their children, that is, he tells her by this will he expects that she will act towards them, not from mere caprice, but fairly, and he confides in her sense of justice towards them, and she is to act in this way by dividing the same, that is, by dividing all the property immediately before described : in fact the will makes Mrs. Raynor a trustee with a power of appoint-

(1) Law Rep. 17 Eq., 320.

(2) Law Rep. 18 Eq., 414.

ment over the whole property comprised in the will in favour of the children.

The authorities referred to at the hearing strongly support this view of the relative position of Mrs. Raynor and her children, and the case of *Curnick v. Tucker* (1) cited by the counsel for the appellant appears to be directly in point. There the testator by his will said—"I hereby appoint my dear wife, Elizabeth Tucker, sole executrix, to whom I leave all my property, landed, personal, and of every description whatsoever and wheresoever, for her sole use and benefit, in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at decease, doing equal justice to each and all of them." In deciding the case Vice-Chancellor Hall observed:—"I consider that I am not at liberty to hold otherwise than that there is a gift to her for life, with a trust imposed upon the property in favour of the children, and with a power to her of disposition between or amongst them in such shares as she may think fit." And again: "I hold, therefore, that this is a gift to Mrs. Tucker for life, with a power of disposition amongst her children in her lifetime, or by deed or will, as she may deem fit." Indeed this is a stronger case than the present, for there the property was left to Mrs. Tucker "for her sole use and benefit," and yet the Vice-Chancellor held that the words which immediately followed created a trust in her for the benefit of the children, whereas in the present case there is no gift to the wife for her sole use and benefit, but the property is given to her openly without any such qualification, and with the declaration of the testator's expectation and intention that she is ultimately to divide the property among all the children. This is a trust which may be executed for the children, and not the mere expression of a feeling or sentiment in their favour. The same principle will be found stated with great clearness and force in Levin's well-known work on Trusts, 6th ed., p. 115, and in Jarman on Wills, 3rd ed., vol. i, p. 356.

PEARSON, J.—The terms of Captain Raynor's will are: "I give to my dearly beloved wife Mary Anne Raynor the whole of my property, both real and personal, including my Government promissory notes, Delhi Bank shares, my house at Firozpur, No. 50, together with my plates and platedware, and whatsoever money,

(1) Law Rep. 17 Eq., 320.

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furniture, carriages, horses, &c., may be in my possession at the time of my decease, together with all monies due or which may afterwards become due, feeling confident that she will act justly to our children in dividing the same when no longer required by her."

"Technical language," says Mr. Jarman in his Treatise on Wills, "is not necessary to create a trust. It is enough that the intention is apparent. Thus it has been long settled that words of recommendation, request, entreaty, wish, or exception, addressed to a devisee or legatee, will make him trustee for the person or persons in whose favour such expressions are used, provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter on the object or objects of the intended trust(1)."

The doctrine thus stated is sanctioned by the authority of decisions to which we have been referred, and I accept it as sound. Applying it to Captain Raynor's will, I cannot doubt that his widow under its terms became a trustee of his estate for their children, and that her own interest in it was a limited one. She was at liberty indeed to use it for her own needs, but was bound to divide it among them when no longer required by her. She performed this duty by the will executed by her on the 5th September 1868, and by that instrument she bequeathed to the plaintiff the twenty-four shares in the Delhi and London Bank which are the subject-matter of the present suit. It would seem to follow that the shares in question belong to the plaintiff, and cannot be sold in execution of decree as the property of the late Mrs. Raynor.

*Before Mr. Justice Pearson and Mr. Justice Turner.*

1878  
 November 18.

• NUR AHMAD (DEFENDANT) v. ALTAF ALI (PLAINTIFF).\*

*Attachment of Land—Private alienation after Attachment—Act VIII of 1859 (Civil Procedure Code) ss. 239, 240.*

Certain land was attached in the execution of a decree in the manner required by s. 235 of Act VIII of 1859, but a copy of the order of attachment

\* First Appeal, No. 22 of 1878, from a decree of Maulvie Maqsd Ali Khan, Subordinate Judge of Bareilly, dated the 30th January 1878.

(1) 3rd ed., vol. ii, p. 356.

was not as required by s. 239 of that Act, fixed up in a conspicuous part or in any part at all of the court-house of the Court executing the decree, nor was it sent to or fixed up in the office of the Collector of the district in which the land was situated. Subsequently to the attachment of the land the judgment-debtor privately alienated it by sale. *Held* that, as the attachment had not been made known as prescribed by law, the provisions of s. 240 of Act VIII of 1859 did not apply, and the sale was not null and void. *Indra Chandra v. The Agra and Masterman's Bank* (1) followed.

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v.  
ALTAF ALI.

THIS was a suit in which the plaintiff originally claimed that an order of the District Judge of Bareilly, dated the 8th September 1887, directing the sale of certain land in the execution of a decree against one Husaini Begam, might be set aside, and such sale might be prohibited, on the ground that the plaintiff was the proprietor of such land as purchaser of it from Husaini Begam. The plaintiff subsequently to the institution of the suit, the auction sale having taken place, claimed that such sale might be set aside, and the auction-purchaser was in consequence made a party to the suit as a defendant. The original defendant, in execution of whose decree the property in suit had been sold, set up as a defence, *inter alia*, that the plaintiff had purchased the land in suit from Husaini Begam while it was under attachment in the execution of his decree, and the sale was consequently null and void under the provisions of s. 240 of Act VIII of 1859. The District Judge of Bareilly, the Court executing the decree, had, it appeared, ordered the land to be attached on the 2nd February 1875. The written order required by s. 235 of Act VIII of 1859 issued, but it was not made known as directed by s. 239 of that Act. It was not fixed up at all in the court-house of the District Judge of Bareilly, neither was it fixed up in the office of the Collector of the district. On the 30th October 1876 the plaintiff purchased the land from Husaini Begam, the judgment-debtor. Subsequently the defendant applied for the sale of the land in execution of his decree, and obtained an order directing that the sale should take place on the 20th August 1877. The plaintiff objected to the sale, urging that the land had not been attached. The District Judge for certain reasons postponed the sale to the 20th September 1877, and on the 8th of that

(1) 10 W. R., 264, S. C., 1 B. L. R. S. not issue and it was held that, the property not having been duly attached, the provisions of s. 240 did not apply to an alienation of it.  
N. xx. See also *Dwarkanath Biswas v. Ram Chander Roy*, 13 W. R. 186, where the written order required by s. 235 did

1878. month disallowed the plaintiff's objections to the sale. On the  
 NUR AHMAD 19th September 1877 the plaintiff instituted the present suit in  
 the Court of the Subordinate Judge of Bareilly, and on the day  
 ALTAF ALI. following the land was sold. The sale was confirmed on the 17th  
 November 1877.

The Court of first instance gave the plaintiff a decree, holding that the sale was valid, the provisions of s. 240 of Act VIII of 1859 not applying, as the prohibitory order required by s. 205 of that Act had not been duly made known as required by s. 239.

The auction-purchaser appealed to the High Court, contending that as Husaini Begam and the plaintiff were well aware of such attachment proceedings as had been taken, the sale came within the real meaning and intention of s. 240 of Act VIII of 1859, and was null and void.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), *Munshi Hanuman Parshad*, and *Pandit Bishambhar Nath* for the appellant.

*Mr. Conlen* and *Shah Asad Ali* for the respondent.

The judgment of the Court (PEARSON, J., and TURNER, J.), so far as it is material for the purposes of this report, was as follows:

JUDGMENT.—Under the provisions of s. 240 of Act VIII of 1859, a private alienation of property made after its attachment had been duly intimated and made known in the manner prescribed by the Act is declared null and void. It is not shown that the attachment in this case was made known as by the Act directed. It is not proved that a copy of the order was posted in a conspicuous part, or in any part, of the court-house, nor that it was set to or posted in the office of the Collector. We are therefore unable to find that the alienation was made after the attachment had been made known as by the Act prescribed, and consequently the provisions of s. 240 do not apply—*Indra Chandra v. The Agra and Masterman's Bank* (1).

## FULL BENCH.

*Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and  
Mr. Justice Oldfield.*

1878  
November 14.

**PARTAB SINGH (DECREE-HOLDER) v. BENI RAM (JUDGMENT-DEBTOR).\***

*Execution of Decree—Separate Suit—Act X of 1877 (Civil Procedure Code), s. 244.*

Moneys realised as due under a decree if unduly realised are recoverable by application to the Court executing the decree and not by separate suit. The opinion of STUART, C.J., in *The Agra Savings Bank v. Sri Ram Mitter* (1) differed from *Haramohini Chowdhraiz v. Dhanmani Chowdhraiz* (2) and *Ekwari Singh v. Bijaynath Chattapadhyay* (3) distinguished.

ONE Beni Ram, against whom a decree for the possession only of certain land had been made in favour of one Partab Singh, applied to the Subordinate Judge of Bareilly, the Court executing the decree, for an order directing the decree-holder to refund a certain amount of the mesne profits of such land, which the decree-holder had realised in execution of the decree, on the ground that such amount had been unduly realised. The Subordinate Judge, finding that the decree-holder had unduly realised under the decree the amount claimed by the judgment-debtor, made an order directing the decree-holder to refund such amount.

The decree-holder appealed to the High Court against the order of the Subordinate Judge, contending that moneys unduly realised under a decree were not recoverable by application to the Court executing the decree but by separate suit.

The Court (PEARSON, J., and OLDFIELD, J.) referred to the Full Bench the question "whether moneys realised as due under a decree can be recovered, as having been unduly realised, in the execution department."

The *Junior Government Pleader* (Babu Dwarka Nath Banerji), *Mir Akbar Husain*, *Pandit Bishambhar Nath*, and *Munshi Hanuman Prasad* for the appellant.

*Munshi Sukh Ram* for the respondent.

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\*First Appeal, No. 18 of 1878, from an order of Maulvi Maksud Ali Khan Subordinate Judge of Bareilly, dated the 9th March 1878.

(1) I. L. R., 1 All., 388.

(2) 1 B. L. R. A. C., 138.

(3) 4 B. L. R. A. C., 111.



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v.  
BANI RAM.

The judgment of the Full Bench was delivered by  
TURNER, OFFG. C.J.—We are asked whether moneys realised as due under a decree can be recovered if unduly realised by application to the Court in the execution of decree. The language of the Codes, both the repealed and the existing Code, appears to us express on this point. The question whether moneys have been duly or unduly levied under a decree is clearly a question relating to the execution of the decree, and, if it arises between the parties to the suit or their representatives, the Code expressly declares it shall be determined by order of the Court executing the decree and not by separate suit. It has frequently happened that orders for the restitution of moneys unduly levied under a decree have come before this Court in appeal, and with the exception of one instance in no case has it been held that such orders could not properly be passed. We refer to the numerous cases heard by this Court on appeal from the Judge of Bareilly known as Husaini Begam's case. In these cases the decree-holder, by executing the decree of an Original Court instead of the modified decree of the Appellate Court, had recovered sums largely in excess of the sums she was entitled to recover and was compelled to make restitution by orders passed in the execution of the decree. In *The Agra Savings Bank v. Sri Ram Mitter* (1) the learned Chief Justice advanced in support of the opinion pronounced by him two cases decided by the Calcutta High Court. In *Haromohini Chowdhraïn v. Dhanmani Chowdhraïn* (2) no more was decided than this: that mesne profits which were neither decreed nor claimed in a suit for possession after the date of the institution of the suit could be claimed in a separate suit. In *Ekowri Singh v. Bijaynath Chattapadhyā* (3) it was held that mesne profits which were not awarded by the decree could not be obtained by an order of the Court executing the decree. It appears to us that these cases, of which the authority is not impugned in this Court, and indeed there are decisions of this Court in accordance with them, do not bear on the question before us. In the cases cited there was no question whether the amount claimed was or was not decreed, for the decrees had admittedly awarded no mesne profits for the period for which they were claimed by separate suit.

(1) I. L. R., 1 All., 388.

(2) 1 B. L. R. A. C. 138.

(3) 4 B. L. R. A. C., 111.

In the case before us the applicant complains that he has been compelled to pay what he was not bound to pay under the decree. We are of opinion that he adopted not only the proper course, but the only course open to him, in presenting his application to the Court executing the decree.

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v.  
BENI RAM.

## APPELLATE CIVIL.

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

GULZARIMAL (DEFENDANT) v. JADAUV RAI (PLAINTIFF).\*

1878  
November 18.

*Suit for a Declaration of Right—Suit to set aside an Order under s. 246 of Act VIII of 1859, disallowing a claim to property under attachment—Act VII of 187. (Court Fees Act), s. 7 (iii), and sch. ii, 17—Consequential relief.*

*Held* that a suit for a declaration of the plaintiff's proprietary right to certain moveable property attached in the execution of a decree while in the possession of the plaintiff, and for the cancelment of the order of the Court executing the decree made under s. 246 of Act VIII of 1859, disallowing his claim to the property, could be brought on a stamp of Rs. 20, and need not be valued according to the value of the property under attachment.

*Chunna v. Ram Dial* (1) followed. *Mufti Jaloluddin Mahomed v. Shohorullah* (2) dissented from. *Motichand Jaichand v. Dadabhai Pestanji* (3) and *Chakalinga peshana Naicher v. Ackiyar* (4) distinguished (5).

THIS was a suit in which the plaintiff claimed a declaration of his proprietary right to certain grain, valued at Rs. 1,200, and the cancelment of an order made by the Munsif of the city of Moradabad on the 17th May 1876, disallowing his claim to the same. The grain was attached by the defendant, when in the possession of the plaintiff, in the execution of a decree for money held by the defendant, as the property of the defendant's judgment-debtor. The plaintiff paid on his plaint an aggregate amount of court-fees, viz., a fee of Rs. 10 in respect of his claim for a declaration of his proprietary right to the property in suit and a similar fee in respect of his claim for the cancelment of the Munsif's order. The defendant contended, amongst other things, that the plaint was not suffi-

\* Second Appeal, No. 593 of 1878, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 25th September 1877, reversing a decree of Maulvi Muhammad Wajih-ul-la Khan, Subordinate Judge of Moradabad, dated the 11th April 1877.

(1) I. L. R., 1 All., 360.

(2) 15 B. L. R., Ap. 1: S. C., 22 W. R., 422.

(3) 11 Bom. H. C. Rep. A. C. J., 186.

(4) I. L. R., 1 Mad., 40.

(5) In *Motichand Jaichand v. Dadabhai Pestanji*, however, it was held that a suit, having for its object the relief of property from attachment, seeks consequential relief.

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ently stamped, as the plaintiff should have paid on his plaint a fee according to the value of the property in suit. The Court of first instance held, on the issue arising out of this contention, that the plaint was sufficiently stamped, and, deciding the other issues arising in the suit in favour of the defendant, dismissed the suit. On appeal by the plaintiff the lower appellate Court, for reasons which it is unnecessary for the purposes of this report to state, reversed the decree of the Court of first instance and remanded the suit for a new trial.

The defendant appealed to the High Court, contending, amongst other things, that the plaintiff should have paid a fee on his plaint according to the value of the property in suit.

Lala *Lalta Prasad* and Babu *Ratan Chand* for the appellant.  
 Pandit *Bishambhar Nath* and Shah *Asad Ali* for the respondent.

The judgment of the Court, so far as it related to this contention, was as follows :

SPANKIE, J.—We are of opinion that the plaintiff was at liberty to sue for a declaratory decree to establish his right to the property attached; a stamp of Rs. 10 was sufficient for this purpose. But the plaintiff also paid Rs. 10 besides, i.e., Rs. 20 on the whole plaint, inasmuch as he sued also to set aside the miscellaneous order against him. In each of the two claims a ten rupee stamp is sufficient under the Court Fees Act. The Bombay case cited, *Motichand Jai-chand v. Dadabhai Pestanji* (1) does not apply, as there the plaint included a claim for possession. Nor does the ruling of the Madras Court in *Chakalingapeshana Naicker v. Achiyar* (2) apply, for there the main object of the suit was held to be the recovery of possession of certain lands of which the plaintiff had been out of possession for years. We are not prepared to follow the decision of the Calcutta Court in *Mufti Jalaluddin Mahomed v. Shohorullah* (3). We do not think that in a suit like the one before us it is imperative that the court-fee should be according to the value of the property. When the suit was brought the property was under attachment, and as it is part of the claim of the plaintiff that it was in his possession when attached, he was not under any necessity of asking for more relief

(1) 11 Bom H. C. Rep. A. C. J., 186.

(3) 15 B. L. R., Ap. 1 : S. C., 22 W.

(2) I. L. R., 1 Mad., 40.

R., 422.

than the circumstances of the case required. That relief was confined to a simple declaration of title and the setting aside of the order of the Munsif in the execution department by removal of the attachment, both requirements being included in sch. ii, art. 17 of the Court Fees Act. No ruling of this Court antagonistic to the view now taken has been cited; we therefore overrule appellant's objection on this point. (The learned Judge then proceeded to dispose of the other pleas in appeal.

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GULZARI  
MALv.  
JADAV RAI.

*Before Mr. Justice Pearson and Mr. Justice Turner.*

1876

FALAK DHARI RAI AND OTHERS (JUDGMENT-DEBTORS) v. RADHA PRASAD SINGH (DECREE-HOLDER).\*

November 21.

*Appeal to Her Majesty in Council—Act X of 1877 (Civil Procedure Code), ss. 594, 595, 596—Interlocutory Order—Order.*

The District Judge of Ghazipur recalled to his own file the proceedings in the execution of a decree which were pending in the Court of the Subordinate Judge of Shahabad and disallowed an application for the execution of the decree which had been preferred to that Judge. The High Court, on appeal from the order of the District Judge, annulled his order as void for want of jurisdiction, and remitted the case in order that the application might be disposed of on its merits, directing that the record of the case should be returned to the Subordinate Judge of Shahabad. On an application for leave to appeal to Her Majesty in Council from the order of the High Court, held that such order was in the nature of an interlocutory order, and was not one from which the High Court could or ought to grant leave to appeal to Her Majesty in Council.

THIS was an application for leave to appeal to Her Majesty in Council from an order of the High Court, dated the 21st December 1877, made under the following circumstances: A decree dated the 29th November 1856, made by the Sudder Court on appeal, which modified a decree made by the District Judge of Ghazipur, dated the 14th April 1856, was transferred by the District Judge, while in course of execution, for execution by the Principal Sudder Ameen of Ghazipur. The Principal Sudder Ameen after the proceedings in execution of the decree were transferred to him, granted a certificate for the execution of the decree within the jurisdiction of the Subordinate Judge of Shahabad. On the 5th March,

\* Application, No 8 of 1878, for leave to appeal to Her Majesty in Council.

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SAD SINGH.

1877 the judgment-debtors petitioned the District Judge of Ghazipur to call for the proceedings pending in the Court of the Subordinate Judge of Shahabad on the ground that there were irregularities in them. The District Judge complied with the petition, and having arrived at the conclusion that all the proceedings which had been taken in execution were void for want of jurisdiction, and that the execution of the decree was barred by limitation, disallowed on the 13th April 1877 an application for execution of the decree which had been made to the Subordinate Judge of Shahabad on the 19th March 1877, being in his own opinion warranted in so doing by the provisions of ss. 290 and 292 of Act VIII of 1859. He rested this opinion on the erroneous view that the decree was one of the Court of the District Judge of Ghazipur. The decree-holders having appealed to the High Court against the order of the District Judge, the High Court (PEARSON, J., and TURNER, J.) on the 21st December 1877, pointing out the error of the District Judge, and observing that ss. 290 and 292 of Act VIII of 1859 did not empower the District Judge to meddle with the Court executing the decree in the Shahabad district, his Court not being either the Court which made the decree or having appellate jurisdiction in respect of the decree or the execution thereof, annulled the order of the District Judge dated the 13th April 1877 as void for want of jurisdiction, and remitted the case that the application for execution might be disposed of on the merits, and directed that the record of the case should be returned to the Subordinate Judge of Shahabad.

On the 19th June 1878 the present application was made on behalf of the judgment-debtors for leave to appeal to Her Majesty in Council from the order of the High Court dated the 21st December 1877.

Mr. *Howard* for the petitioners.

*Lala Lalta Prasad* for the opposite party.

The Court (PEARSON, J., and TURNER, J.) made the following order :

TURNER, J. — This Court has simply set aside an order of the Judge of Ghazipur calling on to his own file proceedings pending in the Court of the Subordinate Judge of Shahabad, and has directed that the proceedings be remitted to the Shahabad Court that the applica-

tion presented to that Court may be disposed of. When it is disposed of the decision may be appealed, and the superior Court which finally determines the application may have power to grant leave of appeal from its decision to Her Majesty in Council. The question of the competency of the Shahabad Court to entertain the application may then be raised. The order before us is in our judgment in the nature of an interlocutory order, and not an order from which we can or ought to give a certificate for appeal to the Privy Council. The learned counsel's argument, based on the provisions of s. 594 of Act X of 1877, that the word "decree" embraces judgment and order, does not support the contention that the Court can or ought to give leave to appeal for any order. The certificate is refused with costs.

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v.  
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SAD SINGH.

*Application refused.*

## PRIVY COUNCIL.

ZAIN-UL-ABDIN KHAN (DEFENDANT) v. AHMAD RAZA KHAN.  
AND OTHERS (PLAINTIFFS).

P. C.\*  
1878  
November 21  
& 22.

[On appeal from the High Court of Judicature at Allahabad, North-Western Provinces.]

*Act VIII of 1859, ss. 109, 110, 111, 119, 147—Ex-parte Judgment—Appeal.*

The provision in s. 119 of Act VIII of 1859, that "no appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared," must be understood to apply to the case of a defendant who has not appeared at all, and not to the case of a defendant who, having once appeared, fails to appear on a subsequent day to which the hearing of the cause has been adjourned.

THIS was an appeal from a decision of a Division Bench of the Allahabad High Court, dated the 26th August, 1875, dismissing an appeal from an order of the Subordinate Judge of Zila Moradabad, dated the 8th April 1874.

The judgment of the High Court was as follows :

"The suit was instituted on the 14th September 1872, and after much delay, owing to the residence of both parties in foreign territory, the hearing was, at the request of the pleaders of both parties,

\* Present : SIR J. W. COLVILLE, SIR B. PRACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

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KHAN.

adjourned for the 5th January 1873. Issues were framed, and the 28th October fixed for the hearing; the suit was not called on that date, but on the 7th November 1873. It was again adjourned at the like request to the 2nd February, and subsequently to the 8th April 1874. On 6th April the defendant appellant submitted a petition praying for a further adjournment, on the plea that his pleader had gone to Calcutta to consult the Advocate-General and could not return in time. This petition was not presented by a pleader nor by any duly authorised agent, and was rejected. On the 7th April the defendant's pleader telegraphed to the Subordinate Judge requesting him to postpone the hearing. The Subordinate Judge refused to consider this irregular application, and on the 8th April the case was called on in due course. Although the defendant had an agent in Moradabad, no other pleader than Ganesh Parshad, who was absent in Calcutta, was appointed, and the defendant appearing neither in person nor by pleader, on the 8th April the case was heard and decided *ex-parte* under the provisions of ss. 147 and 111. The appellant subsequently took the proper step of applying to the Subordinate Judge, under s. 119, for an order to set aside the judgment, but unfortunately he did not proceed with that application, and it was struck off for default, the appellant being advised by his late counsel to proceed by way of appeal. He is met by the objection that the appeal does not lie, as the judgment was passed *ex-parte*. The appellant's counsel urges that the case was not heard by the Subordinate Judge *ex-parte* under s. 111; that the default of the appellant was such a default as is contemplated in s. 145, and not such a default as is contemplated in s. 147. It appears clear to us that the former section applies where the parties appear, but either of them fails to proceed with the case; while s. 147 applies to cases like the present, in which at an adjourned hearing a party failed to appear. If the Judge heard the suit at all in the absence of the appellant, he could only do so under the provisions of s. 111. Having the option of proceeding with the hearing or again adjourning the case, he proceeded to hear and determine it.

“Then it is contended that the appellant was entitled to proceed either by way of appeal or by an application under s. 119, and *Kake Churn Dutt v. Modhoo Soodun Ghose*, 6 W. R., 86, is relied on, but

that ruling has not apparently been followed in *Administrator-General of Bengal v. Lala Dyaram Das*, 6 B. L. R., 688, and in *Purus Ram v. Jyunti Parshad*, H. C. R., N.-W. P., 1869, decided on the 21st May of that year, it has been held that no appeal lies.

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KHAN.

“The omission to follow the procedure required by s. 119 has deprived the appellant of all remedy. The appeal must therefore be dismissed with costs.”

Mr. Leith, Q. C. (Mr. C. W. Arathoon with him), for the appellant, contended that under the circumstances of the case the Judges of the High Court were wrong in holding that no appeal lay to them. In *Goluckbur v. Bishonath Geeree* (1) it was held by the Calcutta High Court that, where a defendant had appeared on the day fixed in the summons, although he put in no answer or written statement, a judgment afterwards pronounced against him was open to appeal as not being an *ex-parte* judgment within the meaning of s. 119 of Act VIII of 1859. The present was a stronger case, since the defendant had appeared and put in his defence and issues had been fixed. In *Gorachand Goswami v. Raghu Mandal* (2) it was held that the provision in s. 119 refers only to the case of a defendant who has never appeared, not to the case of a defendant who is only absent on an adjourned hearing. *Kalee Churn Dutt v. Modhoo Soodun Ghose* (3), noticed by the High Court, is to the same effect. See also *Amritnath Jha v. Roy Dhunpat Singh* (4), in which the case of *Bhimacharya v. Fakirappa* (5), decided by the Bombay High Court, is distinguished. In *The Administrator-General of Bengal v. Lala Dyaram Das* (6), cited by the Court below, the point decided was different, there having in fact been no appearance of the defendant. The only decision which supported the view taken by the High Court was that in *Purus Ram v. Jyunti Parshad* (7), which was a decision of the same Court and itself erroneous.

The respondents did not appear.

(1) Marsh. 32.

(2) 3 B. L. R. Ap., 121.

(3) 6 W. B., 86.

(4) 8 B. L. R., 44.

(5) 4 Bom. H. C. Rep. A. C. J., 206.

(6) 6 B. L. R., 688.

(7) H. C. R., N.-W. P., 1869, decided on the 21st May of that year.



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KHAN.

Their Lordships' judgment was delivered by  
SIR BARNES PEACOCK.—The question in this case is whether the first part of s. 119 of Act VIII of 1859 applies to a case which has been decided under the provisions of s. 147 of the same Act. That part of s. 119 is in the following words: "No appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared." S. 119 must be read together with ss. 109, 110, and 111. S. 109 says: "On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the court-house in person or by a pleader, and the suit shall then be heard, unless the hearing be adjourned to a future day which shall be fixed by the Court." S. 110 says:—"If on the day fixed for the defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned, neither party shall appear, either in person or by a pleader, when duly called upon by the Court, the suit may be dismissed." There the words are: "If on the day fixed for the defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned." Then comes s. 111, which says: "If the plaintiff shall appear in person"—it does not say "on the day fixed, or on any subsequent day," but simply "if the plaintiff shall appear in person or by a pleader, and the defendant shall not appear in person or by a pleader, and it shall be proved to the satisfaction of the Court that the summons was duly served, the Court shall proceed to hear the suit *ex-parte*." Ss. 109 and 111, taken by themselves, clearly relate to the appearance of parties and to their non-appearance at the first hearing of the suit. The 146th and 147th sections are enactments relating to adjournments. S. 147 enacts that "if on any day to which the hearing of the suit may be adjourned, the parties, or either of them, shall not appear in person or by pleader, the Court may proceed to dispose of the suit in the manner specified in s. 110, s. 111, or s. 114, as the case may be, or may make such other order as may appear to be just and proper in the circumstances of the case." There is no enactment in that section that, in case the Court disposes of the suit in the manner specified in s. 111 (the section which applies to the present case), the first part of s. 119 shall apply to such a judgment. Under Act VIII of 1859 the general rule is that an appeal lies to the High Court from a

decision of a Civil or Subordinate Judge, and a defendant ought not to be deprived of the right of appeal, except by express words or necessary implication. Looking at all the sections together, their Lordships are of opinion that the words "who has not appeared" as used in s. 119, mean "who has not appeared at all," and do not apply to the case of a defendant who has once appeared, but who fails to appear on a day to which the cause has been adjourned.

There are several cases to that effect decided by the High Court in Calcutta : Marshall's Report, page 32 ; 3rd Bengal Law Reports Appendix, 121, and the 6th Weekly Reporter, page 86.

Two cases were referred to by the learned Judges who decided this case,—a case in 6th Bengal Law Reports, 688, and one from the North-Western Provinces Reports of 1869, decided the 21st May of that year. Their Lordships have referred to those decisions. It appears to them that the case cited from the 6th Bengal Law Reports, 688, so far from being an authority in support of the decision of the High Court, is rather an authority against it. The case which is cited from the North-Western Provinces Reports of 1869, decided the 21st May of that year, is certainly in conflict with the several decisions in the High Court at Calcutta to which reference has been made, and which in the opinion of their Lordships were correctly decided.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the High Court was erroneous, and that the case be remanded to the High Court to hear and determine the appeal. The respondent must pay the costs of this appeal.

Agent for the appellant: Mr. T. L. Wilson.

## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Turner.*

HAMID ALI (PLAINTIFF) v. IMTIAZAN AND OTHERS (DEFENDANTS).\*

1878  
November 1.

*Muhammadian Law—Husband and wife—Divorce—Repudiation by Ambiguous Expression—Custody of Minor Children.*

Where a Muhammadian said to his wife, when she insisted against his wish on leaving his house and going to that of her father, that if she went she was his

\* Second Appeal, No. 1211 of 1887, from a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 15th August 1877, affirming a decree of Maulvi Nasar-u'-la Khan, Munsif of Mainpuri, dated the 31st March 1877.

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**HAMID ALI**  
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**IMTIAZAN.**

paternal uncle's daughter, meaning thereby that he would not regard her in any other relationship and would not receive her back as his wife, *held* that the expression used by the husband to the wife, being used with intention, constituted, under Muhammadan Law, a divorce which became absolute if not revoked within the time allowed by that law.

*Held* also, the divorce having become absolute, the parties being *Sunnis*, that the husband was not entitled to the custody of his infant daughter until she had attained the age of puberty (1.)

THIS was a suit in which the plaintiff, a Muhammadan of the sect of *Sunnis*, claimed, amongst other things, to recover his wife and his infant daughter. His wife set up as a defence to this claim that the plaintiff was not entitled to recover her as he had divorced her before the suit. It appeared from the evidence of the plaintiff that his wife's father and her brothers had come to his house with the object of taking his wife away to her father's house. His wife was willing to go, but the plaintiff objected to her going, and addressed her as follows: "Thou art my cousin, the daughter of my uncle, if thou goest" (2). His wife did not take any notice of these words, but left his house. On the issue whether the expression used by the plaintiff to his wife constituted a divorce, the Court of first instance held, relying on a passage in the *Durul-Mukthar*, that it did so, being an "ambiguous expression" used by the plaintiff, while in an angry state, with an intention to repudiate his wife. It also held that, as the repudiation had not been revoked within one year, the divorce had become final, and the plaintiff could not therefore recover his wife. It also held that the plaintiff could not recover his infant daughter till she attained puberty. The lower appellate Court, on appeal by the plaintiff, concurred in the view of the Court of first instance that the plaintiff had divorced his wife. It did not determine whether or not the plaintiff had revoked the divorce within the time allowed by Muhammadan law, or whether he was entitled to the custody of his infant daughter.

The plaintiff appealed to the High Court, contending that the expression used by the plaintiff to his wife did not constitute a divorce, under Muhammadan law, such expression having been used by him in anger only, and without the intention of divorcing

(1) See also *Mohomuddy Begam v. Oomdutoonisso*, 13 W. R. 454; and *Bee-Shun Bibee v. Fuzuloolah*, 20 W. R. 41,

where the parties presumably were *Sunnis*.

(2) "*Ki tu mere chacha ki larki lahin hai, agar tu jaegi.*"

her; that, assuming such expression constituted a divorce, the plaintiff was entitled to revoke the divorce, which he had done by asking his wife to return to him; and that the lower Appellate Court had failed to determine whether or not the plaintiff was entitled to the custody of his minor daughter.

Mr. *Mahmood* and Pandit *Ajudhia Nath*, for the appellant.

*Lala Lalta Prasad*, for the respondent.

The High Court remanded the case for the trial of the issue set out in the order of remand, which was as follows:

TURNER, J.—The words used by the appellant to his wife appear to fall within the class of ambiguous expressions. By saying, if you go to your father's house you are my paternal uncle's daughter, the appellant intended to declare that he would regard her in no other relationship, and not receive her back as his wife. This if spoken with intention (as it doubtless was), constituted a divorce, which became final if it was not revoked within the time allowed by law (1). The appellant alleges it was so revoked. The Court of first instance found that the appellant did not recall his wife for a year, a finding which appears possibly inaccurate. The whole of the questions on the merits were raised by the very general expressions used in the memorandum of appeal, but the issue as to revocation was not determined. The lower Appellate Court must try the following issue: Was the divorce revoked within the period allowed by law? On the return of the finding ten days will be allowed for objections. Regarding the custody of the daughter, if it be found that the divorce was not revoked, the daughter must remain with her mother until she has attained the age of puberty.

The lower Appellate Court found on this issue that the plaintiff had not revoked the divorce.

The High Court (PEARSON, J., and TURNER, J.) delivered the following judgment:

TURNER, J.—No objection having been taken to the finding on the issue remitted we accept it. The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) See *Pailie's Digest of Muhammadan Law*, p. 228.

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*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.*

UDA BEGAM (PLAINTIFF) v. IMAM-UD-DIN (DEFENDANT).\*

*Execution of Decree—Appeal from Order—Act X of 1877 (Civil Procedure Code), ss. 2, 3, 244, 584, 588 (j)—Act VIII of 1859 (Civil Procedure Code)—Repeal—Pending Proceedings—Act I of 1868 (General Clauses Act), s. 6.*

The Court executing a decree for the removal of certain buildings made an order in the execution of such decree directing that a portion of a certain building should be removed as being included in the decree. On appeal by the judgment-debtor the lower Appellate Court, on the 22nd September, 1877, reversed such order. *Held, per PEARSON, J.*, on appeal by the decree-holder from the order of the lower Appellate Court, that the lower Appellate Court's order, being within the scope of the definition of a "decree" in s. 2 of Act X of 1877, was appealable under s. 584 of that Act, as well as under Act VIII of 1859, notwithstanding its repeal, in reference to s. 6 of Act I of 1868. The Full Bench ruling in *Thakur Prasad v. Ahsan Ali* (1), followed.

*Held per STUART, C.J.*, dissenting from the Full Bench ruling in *Thakur Prasad v. Ahsan Ali* (1), that a second appeal in the case would not lie.

THE facts of this case were as follows : In executing a decree for the removal of certain buildings made by the High Court in special appeal, the Court of first instance, the Court executing the decree, on the 11th December 1876, ordered the plaster on the walls of a "sidhari" numbered 6 in a map of the premises to be removed. The judgment-debtor appealed from this order to the lower Appellate Court, which set aside the order on the 22nd September, 1877.

The decree-holder appealed to the High Court against the order of the lower Appellate Court, contending that the plaster on the "sidhari" was removeable under the terms of the decree.

The Senior Government Pleader (Lala Juala Prasad) and Munshi Hanuman Prasad, for the appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the respondent.

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\* Second appeal, No. 30 of 1878, from an order of John Power, Esq., Judge of Shahjahanpur, dated the 22nd September, 1877, modifying an order of Rai Raghu Nath Sahai, Munsif of East Budaun, dated the 11th December, 1876.

(1) I. L. R., 1 All., 668.

The following judgments were delivered by the Court :

PEARSON, J.—The admissibility of this appeal has been virtually determined by a recent Full Bench judgment (1) which, until overruled, is binding on us. In my opinion the appeal is admissible, the lower Appellate Court's order being a decree within the scope of the definition contained in s. 2, and consequently appealable under s. 584 of Act X of 1877, as well as under Act VIII of 1859, notwithstanding its repeal, in reference to s. 6 of Act I of 1868. On the merits the appeal, in my opinion, fails entirely. The first Court dismissed the claim to No. 6. The High Court certainly did not decree that claim expressly; and there is nothing in its decree or its judgment, or in the judgment of the first Court relating to the plaster on the "*sidhari*." The appeal appears to be frivolous and vexatious as well as groundless, and I would dismiss it with costs.

This opinion was recorded by me at the time of the hearing of this appeal on the 19th August last, and I have to-day for the first time been made acquainted with the views entertained by the Chief Justice, who in the judgment just now delivered by him, not only expresses his reasons for dissenting from the Full Bench ruling to which reference was made in the first part of my judgment, but sets aside that ruling and dismisses the appeal as inadmissible. Under the circumstances the proper course would have been, I conceive, to refer the point in question again for the consideration of the Full Bench; and in order that such course may be taken, if deemed advisable, I feel it to be my duty to require a reference of this appeal to another or other Judges of the Court under s. 575 of Act X of 1877.

STUART, C.J.—If I could regard this appeal as before me on its merits, I would probably concur in the opinion of my colleague Mr. Justice Pearson, that it is frivolous and groundless and ought to be dismissed. But there is a preliminary question for myself which this case affords me the first judicial opportunity I have had of considering, *viz.*, whether this appeal should have been admitted to a hearing at all. In other words, whether such an appeal lies. And with whatever result or consequence, I feel it my duty to record the opinion I have formed on that question.

(1) I. L. R., 1 All., 669.

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It is suggested that the admissibility of this appeal has been virtually determined by a recent Full Bench judgment of this Court (1). That judgment was delivered during my short absence from the Court on privilege leave and at once carried into practice, without any previous consultation or communication with myself, and, had the circumstances not been so exceptional, it might have been considered to be binding on me, although I was precluded from hearing the argument and judicially considering the reasons on which the judgment is founded. I would have preferred that so important a question, and raised for the first time under the new Code of Procedure, had been delayed till my return to the Court. When I left on short leave on account of the state of my health, I had no reason to believe that any such question would have been brought forward in my absence; and from the nature of the case I could not have anticipated, and I did not anticipate, that any such proceeding would have been entertained; for the question came up before the Full Bench on a reference made by Mr. Justice Turner, dated the 13th November 1877, and a number of other appeals of the same kind having in the meantime been presented, it was felt by the Court generally that owing to difficulties of interpretation arising out of the peculiarities of the provisions of the new Code, some action should be taken by the Court, and it was proposed by one of the Judges that the Legislative Department of the Government of India should be addressed on the subject, and a letter going fully into the difficulties of construction to which I have referred was proposed for adoption by the Court. That mode of proceeding was, however, ultimately abandoned, and the question was allowed to await judicial determination on a suitable opportunity. Such was the state of things when I left the Court on leave at the end of April last, and I very much regret that that opportunity was found almost immediately after my departure, and now all the more from my having formed a deliberate opinion contrary to the conclusion of the Full Bench ruling, for it is possible that, if my colleagues had been made acquainted with the reasons on which my opinion has been formed, they, or some of them, might not ultimately have concurred in the decision which they were induced to accept.

(1) I. L. R., 1 All., 663.

The reference by Mr. Justice Turner, which gave rise to the case before the Full Bench, records an admission directly opposed to the subsequent Full Bench ruling, for the reference is in these terms: "It is admitted that no second appeal lies in this case under the new law, and it appears to me that the application is governed by the new law. I refer the point to the Full Bench at the request of the pleader, and because I am told that there is a difference of opinion in the Court on the point." The Court was then full, and the difference of opinion correctly referred to in this reference did, so far as the question had then been considered, undoubtedly exist; and if there was to be a judicial determination on the question, which had given rise to this difference of opinion, it was to the last degree expedient and desirable that that determination should have been arrived at by deliberation among all the Judges, and not in the absence of, or to the exclusion of, the Chief Justice.

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I may also here observe that the difficulties of construction, which had been anticipated in relation to certain of the provisions of the new Code of Procedure, have to some extent been recognised by the Government of India; and a Bill to amend the Code has for the purpose been introduced into the Legislative Council, and by the kindness of his Excellency the Viceroy, I have been favored with a copy of that Bill, and of the statement of the objects and reasons in support of it. But, excepting in so far as we have the opinion of the Member of Council, who prepared that statement, the Bill so introduced does not appear to me to touch the question of the competency of such an appeal as that now under consideration. By s. 31 of this Bill it is proposed, among other things, to enact that from cl. (j) the following words shall be omitted, viz., "of the same nature with appealable orders made in the course of a suit;" and from the statement of the objects and reasons of the Bill, the opinion would appear to be entertained that "the result will be to restore the first of the two appeals given in effect by Act XXIII of 1861, s. 11, against all orders determining any question relating to the execution of a decree;" and if it had been proposed so expressly to provide in the Bill, no doubt the effect would be to allow a special or second appeal in such a case as that determined by the Full Bench ruling, and also in such a case as



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that now before me. But the correctness of such an opinion depends on another question, no doubt expounded by that ruling, but as to which I have myself entertained serious doubts, *viz.*, whether the effect of s. 6 of Act I of 1868 (the General Clauses Act), is, notwithstanding the repeal of Acts VIII of 1859, and XXIII of 1861, and the express provisions of the new Code of Procedure, to keep alive the law provided by s. 11 of this latter Act, and to apply the remedy of special appeal in the case of orders passed in execution of a decree. I have said that I have entertained serious doubts whether such is the effect of s. 6 of Act I of 1868. Indeed, I may at once say that the opinion I have formed is that that Act cannot have any such effect, and I shall presently explain my reasons for holding that opinion, and that therefore the Bill which has been introduced to amend the new Code of Procedure will fail in effecting the object apparently intended by it in this respect. But that Bill has not yet been passed, and we cannot anticipate in what form or to what effect it may ultimately be adopted as an Act of the Legislature. But to put an end to all such doubts and difficulties, it would be far better to provide *expressly* that the law of s. 11 of Act XXIII of 1861, as interpreted and applied previous to the passing of the present law of procedure, shall, notwithstanding any provisions to the contrary in the new Code, continue to be the law of procedure to be observed by the Courts, than to leave it to the uncertainty implied in the statement of the objects and reasons. The former course would put an end to all controversy, while the latter would leave the matter open to dispute; and it is to be remembered that all the four High Courts have not yet pronounced an opinion on the question of the validity or otherwise of these appeals from orders.

With these general remarks, I now proceed to consider the question of the admissibility of the present appeal, and therein the argument for and against such a proceeding.

The order appealed against was one made in a suit to obtain possession of a house, and to demolish another which, as alleged by the plaintiff, had been improperly built on her land. The judgments of the lower Courts were both against the plaintiff's claim, and she preferred a special appeal to this Court, which reversed

the judgment of the lower Courts and decreed the plaintiff's claim in full. In the proceedings in execution of this Court's decree, the **Munsif**, under a misapprehension as to its full meaning and effect, made an erroneous order dated the 11th December 1876, but which on appeal to the Judge was corrected by an order dated the 22nd September 1877, and the execution of the decree so corrected was ordered by the Judge.

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From that order of the Judge an appeal, in the nature of a special or second appeal, has been presented to this Court, and the question is whether such a proceeding is valid and admissible. According to the Full Bench ruling, delivered under the circumstances which I have explained, such an appeal is valid, and no doubt if the legal effect of s. 3 of the new Code and of s. 6 of the General Clauses Act (to both of which provisions I shall presently advert) is, in a case like the present, still to keep alive the entire procedure allowable under the old Code, such a ruling would be correct. But the opinion which I myself have formed, after having carefully and studiously considered the question, and the sound principles of legal construction which have ever been recognised by the Courts in England, and applied by them to the interpretation of statutory laws, is that no such appeal lies.

By s. 3 of the present Procedure Code, Act X of 1877, it is provided that "nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before the Code came into force." In this provision the meaning of the word "herein" has to be considered. Does it mean the whole Code or merely the particular section of which it forms part? If the former, I would then be disposed to hold that the Full Bench ruling was right in its conclusion, although on different reasoning from that on which the judgment is based, for then there would be nothing to qualify or limit the application of this s. 3 or of s. 6 of the General Clauses Act, the entire new Code being thus simply exempted from any operation in the cases contemplated by s. 3; and, as another consequence, the application of s. 6 of the General Clauses Act would be left unimpeded by any legal considerations arising out of the new Code. But the Full Bench ruling by my colleagues appears to assume that, in the portion of s. 3 which I have quoted, the word "herein" applies

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only to the particular section, s. 3, of which it forms part, and in this respect I concur in the ruling. I think it could never have been intended that the word "*herein*" should have the sweeping effect involved in the other view I have referred to, and that it was not contemplated that the other sections of the new Code relating to appeals should be excluded from consideration in connection with s. 3. The more sound construction therefore would appear to be that the repeal of the enactments, as provided by that section, should not affect the procedure prior to decree, so far as that procedure itself is concerned : and that to such extent the old procedure, notwithstanding its repeal in other respects, is still *pro tanto* saved as regards procedure prior to decree in suits instituted or appeals presented before the new Code came into force. In the present case the date of the Judge's order in appeal to him which is now sought to be the subject of a special or second appeal to this Court is the 22nd September 1877; and being an appeal undoubtedly contemplated by s. 3, and having been presented before the new Code came into force, the whole procedure, that is. the *whole* procedure *which led up to it*, is saved and unaffected by the new procedure.

The question, however, whether the saving of the old procedure in such a case as this of necessity includes and carries with it the right to a second appeal to this Court is, in my opinion, a very different one. I am aware that it has been considered that an appeal is a mere stage or step in one course of procedure till final disposal of the suit. But that opinion I do not hold, nor do my colleagues apparently, for in one part of their judgment they state—"The Code, following the usage in this country, does not treat appeals as mere stages in a suit," although in a previous part of the same judgment they affirm that "an appeal is in fact a stage of a proceeding." My own opinion is that an appeal is not a necessary part of procedure. It is under the control of the parties after decree in the original suit. It is not therefore a necessary stage, but may be availed of or not, according as the original decree is regarded by the party against whom it is given. Irrespective of any such appeal, the procedure in an original suit, not only prior to but inclusive of a decree thereon, is not only complete, but a completed proceeding in itself, carrying with it a

final result within its own limits, in the shape of an operative decree capable of full execution and final satisfaction, and there is thus a *finis litis*. But if the unsuccessful party is dissatisfied with a decree so given against him, there are rules and regulations for an appeal to a higher tribunal, and of these he may take advantage; but such a proceeding is no *necessary* part of the original suit, but a separate and independent proceeding to be availed of, not at the mere bidding of the law or of the appellate Court, but as he himself, the defeated party, may in his discretion deem prudent, or as he may be advised. This view of the distinction between the procedure in an original suit, whether prior to or terminating in a decree, and an appeal therefrom, I shall further illustrate and support by authorities in a subsequent part of this judgment.

As to the procedure mentioned in s. 8 of the new Code, I understand by it the *complete* "procedure prior to decree," and that therefore after such decree the procedure provided by the new Code was to determine all that was to follow. Therefore if it be found in such cases that the new Code did not provide for a second appeal, no such second appeal should be allowed. Now, remembering that s. 3 of the new Code has the limited meaning given to it by the Full Bench judgment of my colleagues, concurring, as I repeat I do, in that view, and that only the repealed enactments mentioned in the first part of s. 3 and not the whole Code, are excluded from consideration, it appears to me that we are bound in the first place to read and apply s. 3 as limited and controlled by other provisions of the Code relating to appeals, that is, to read them *together*, and not against each other, allowing effect to the old Code excepting in so far as it appears to be controlled by the new Code.

On the same principle I would read s. 6 of the General Clauses Act *with* and not against the new Code. It is, indeed, not a little remarkable that the new Code of Procedure from beginning to end makes no allusion to this Act; it is not referred to in any express provisions of the Code, nor is it to be found in the schedule of repealed Acts. My respect for the Legislature forbids me assuming that it was overlooked or disregarded by the framer or framers of the Code, but that the intention was to allow it, not unqualified

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operation, but such legal effect as it might have consistently with the provisions of the new law; and it appears to me that a construction which makes two separate laws consistent, that is, capable of being read together, is to be favoured rather than one which makes them contradictory of each other. This view of the relative operation of these two laws I shall also presently illustrate and support by authority.

But before proceeding further with the explanation of my own views on the subject of these appeals from orders, I would advert to the judgment adopted by my colleagues during my recent brief absence from the Court. After stating the case on the reference before them, and alluding to s. 3 of the new Code and s. 6 of the General Clauses Act, the judgment refers to a Full Bench decision of the High Court of Bombay, *In the matter of Ratansi Kalianji* (1), in support of the opinion expressed by the learned Chief Justice, Sir Michael Westropp, that the chapter of the Code which deals with the execution of decree is prospective, and does not affect proceedings already commenced. The Court consisted of the Chief Justice and four other Judges, and of these two Judges, Mr. Justice Green and Mr. Justice West, concurred with the Chief Justice, while the other two Judges, Sir Charles Sargent and Mr. Justice Bayley, dissented. But the opinion of the Chief Justice, referred to in the judgment of my colleagues, was expressed in a totally different case from the present, for it was whether the imprisonment of a debtor in execution of a decree under the old Code should be determined by that Code or by the new Code, there being a considerable difference between the two in this respect. The Court held, and very reasonably, that the law under which the decree had been made must determine its execution, and that the new Code could not have adversely retrospective effect, and that the execution of the decree and the incarceration of the debtor under it was clearly "a proceeding commenced" within the meaning of s. 6 of the General Clauses Act. But that is a totally different question from that relating to an appeal from an order of this kind; it was simply a question which of two laws, generically of the same nature, should have operation, the law under which the decree was made or the new law? the latter plainly

(1) I. L. R. 2 Bom., 148.

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ending decrees made under its own provisions. I have read the whole of this judgment by my learned and esteemed friend the present Chief Justice of Bombay with the greatest respect and with much sympathy, and, I may add, with admiration at its legal reasoning and the judicial language in which it is expressed. One of the other Judges, Mr. Justice Green, who concurred in the conclusion arrived at by the Chief Justice on the question before the Court, referred to a previous Full Bench ruling of the same Court in the case of *Rotanchand Srichand v. Hanman-rav Shirbakas* (1), by which it was decided that, under the words 'proceedings commenced' in s. 6 of the General Clauses Act, the right of appeal to the District Court from a decree made before the Bombay Civil Courts Act, 1869, came into operation by a Principal Sadar Amin was not taken away by that Act. This case was argued before a Full Bench consisting of the then Chief Justice, and Warden, Gibbs, and Melvill, JJ. But judging from the report of this case, it does not appear to have been very fully argued, and the judgment itself is comparatively brief, and it does not appear to me to examine the question before it in a comprehensive manner. It would have been more satisfactory if the judgment had contained a more searching examination of the legal principles applicable to the question and of the rules of construction of Statutes adopted and applied by the Courts in England. For myself I cannot regard it as an authority binding on me, and I consider myself free to form my opinion on the case before me in my own Court irrespective of it.

The Full Bench judgment of my colleagues then proceeds to deduce an argument by analogy with regard to the prospective operation of laws from certain sections of the Code, ss. 311, 312, 283, and others. But such an argument I am quite unable to appreciate. At best it is far-fetched and fails in affording any material assistance in the solution of the question I am at present considering. The judgment then proceeds to allude to s. 588 of the new Code, and to state, for the reasons it gives, that it is not unreasonable to conclude that, in leaving the enactments of the new Code as they stand, the Legislature had in view the provisions

(1) 6 Bom. H. C. R., A. C. J., 166.

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of the General Clauses Act. In this conclusion, as will be seen, I concur, although not for the reasons assigned, nor to the extent argued for, by the judgment. I may be permitted here to observe (if the allusion may be allowed in a judicial exposition) that such a general conclusion, equally entertained by my colleagues and myself, although on different grounds and to a different extent, is curiously at variance with a recent official announcement (1) publicly made in another place by the Hon'ble Member of Council who is primarily responsible for the language of the new Code, that in its preparation there had been "a strange forgetfulness of the General Clauses Act." Now, although it might fairly be contended that this remark goes to show that a second appeal from orders was never intended or contemplated by the Legislature, I quite agree that we are not bound to consider that there was any such forgetfulness, but on the contrary to assume that the same Legislature which passed both laws must be taken, when preparing the new Code of Procedure, to have had at the time in its mind the General Clauses Act; and it appears to me sufficient for this purpose to point out, as I have already done, that this same General Clauses Act, I of 1868, is passed over in silence in the new Code, and is not to be found in the schedule of repealed Acts.

The decision of the Bombay Court, as adverted to by Mr. Justice Green, is then referred to by my colleagues, and in connection with it the opinion is expressed "that an appeal is in fact a stage of a proceeding," which, however, as I have shown is at variance with another opinion shortly after stated in the same judgment, that "the Code following the usage in this country does not treat appeals as mere stages in a suit."

The rest of the judgment is occupied with the exposition of views in which I am unable to concur for reasons I shall now proceed to explain.

(1) The announcement to which the learned Chief Justice probably refers is the speech of the Hon'ble Mr. Stokes on moving for leave to introduce a Bill to amend the Code of Civil Procedure on the 20th of June last, when the Hon'ble Member is reported to have said:—"It had not been thought neces-

sary to provide" (in the amending Bill) "'against difficulties which had arisen from a strange forgetfulness'" (query in construing the Code) "or the provisions of the General Clauses Act (I of 1868), section 6. and the decision of the Bombay High Court (6 Bom. A. C. J. 166) on that section."

The section of the new Code chiefly, if not solely, to be considered in the case now before me is s. 588, which forms the commencement of ch. xliii, and is headed "Of appeals from orders;" but before any further reference to that section I would notice an opinion expressed by one of my colleagues, who, although he concurred in the conclusion approved by the other members of the Court who formed the full Bench during my absence, simply recorded a brief judgment to that effect, and refrained from adopting the reasoning accepted by the others. The opinion in question was to the effect that, not only was there an appeal to this Court from such an order as he was then considering (and which was of the same nature as that now before me) under the old Code, Act VIII of 1859, as in his opinion kept alive by s. 6 of the General Clauses Act, but that the order was also appealable as an order falling within the definition of "decree" in s. 2 of the new Procedure Code, and that it was therefore appealable under s. 584. But with the greatest deference to my hon'ble colleague such a view of that section has surprised me not a little, for that section, forming the beginning of ch. xlii, and headed "of appeals from appellate decrees," plainly contemplates a decree determining the *merits* of the suit in which it is made, and has no application whatever to an order of this kind passed merely in execution of such a decree. And this to my mind is sufficiently shown by the express and peculiar provision made respecting appeals from orders by the subsequent s. 588. But as I have stated, my hon'ble colleague justifies his opinion that such an order as this is appealable under s. 584, by referring to the definition of "decree" in s. 2 of the new Code, where that term is defined to mean "the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied;" and then, as an illustration of what is meant by this determination, it is added,—“an order on appeal remanding a suit for retrial is not within this definition,” so that, according to the intention of the definition, a remanding order directing a re-trial of a suit on its merits is not within its meaning, although an order merely directing the execution of the decree, and not touching the merits of the suit, is within the definition! This surely is a little startling, and possibly on reconsideration my hon'ble colleague may hesitate

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before adhering to such a view. But further it is well known to lawyers and the Courts at home that legislative definition or interpretations of this kind, being necessarily of a very general nature, not only do not control, but are controlled by, subsequent and express provisions on the subject-matter of the same definition, and that we cannot therefore apply this definition of decree to an order of the kind now before me, seeing that it belongs to a class of orders which, with reference to the remedy of appeal, are expressly and specially dealt with in a subsequent chapter and section, viz., s. 588, to the provisions of which I hold the definition in question must yield. In Sir F. Dwarries' well-known *Treaties on Statutes*, second ed., 1848, page 509, there is the following observation :—" Interpretation clauses are by no means to be strictly construed, and convenience seems likely, to lead to their being practically disregarded;" and then in support of such opinion he quotes from a judgment of Lord Chief Justice Denman, reported in 7 A. and E., page 480, in which, with reference to the contention for the strict application of a legislative definition, I find the following remarks :—" But we apprehend that an interpretation clause is not to receive so rigid a construction that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances:" and again in the same judgment—" We cannot refrain from expressing a serious doubt whether interpretation clauses of so extensive a range will not rather embarrass the Court in their decision than afford that assistance which they contemplate. For the principles on which they are themselves to be interpreted may become matter of controversy, and the application of them to particular cases may give rise to endless doubts." And there are other illustrations of the same kind in Dwarries all going to show that a legislative definition or interpretation clause must yield to enactments of a special and precise nature, and like words in schedules they are received rather as general examples than as overruling provisions. Applying these views, the demonstration is obvious that the kind of "order" that was before the Full Bench, and is now considered by me in the present case, is in no way appealable under s. 584.

The argument founded on s. 6 of the General Clauses Act, as modifying if not preventing the application of s. 588 to such

a case as this, is more pertinent, but as I shall show equally fallacious.

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S. 588 provides that "an appeal shall lie from the following orders under this Code, and from no other such orders." These orders are then enumerated from *a* to *w* inclusive, and at the end of such enumeration there is the very distinct provision that "the orders passed in appeal under this section shall be final," and it is under (*j*) that the present case has to be considered. The orders therein described are "orders under s. 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit." For the order sought to be appealed against is clearly one falling under *c* of s. 244, being a question arising between the parties to the suit in which the decree was passed and relating to the execution of the decree. As to the words "of the same nature as appealable orders made in the course of a suit," I concur in the remark publicly made in another place, that it is not very easy to understand them; and it is satisfactory to know they have been left out in the Bill brought in to amend the Code, and I trust if the Bill passes into law that it will be allowed to stand with this omission. The order then, being thus plainly one falling within not only the meaning but the express terms of *j* in s. 588, is on the face of that section not further appealable. But it is said that, because the decree for the execution of which the order was made was a decree passed under the old Code, it was a "proceeding commenced" within the meaning of s. 6 of Act I of 1868, the General Clauses Act. That is an opinion, however, which can only be maintained by holding that that Act, unless expressly repealed *in toto*, must be understood to override in their entirety the whole provisions of a subsequent Act dealing with the same subject-matter, no matter how carefully or specially such provisions may be expressed. Such a view of the law appears to me to be only stated in order to be at once rejected as an incongruity in the highest degree unreasonable. A reading of the law on the contrary, which would make the two Acts consistent, by allowing a subsequent one to modify the previous Act, is surely to be preferred. Nor do I find in s. 6 of Act I of 1868 anything to

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interfere with, much less to exclude, such a principle of construction while it is strongly supported by the very clear and unmistakable language of the new Code. Of the literal meaning of s. 588 on the face of it, there can be no doubt whatever. It is expressed in terms which, of themselves, are applicable to all possible cases, and it is not to be contradicted in this respect, in the sense of being abrogated, unless that intention appears, not by way of doubtful implication or inference, but by precise and express language; and the new Act and not the old should have the benefit of any such doubt. S. 6 of Act I of 1868 is in these terms :—"The repeal of any Statute, Act, or Regulation shall not affect anything done, or any offence committed, or any fine or penalty incurred, or any proceedings commenced, before the repealing Act shall have come into operation." There is nothing here said about *appeals* and the force of the application of this section to the present case turns on the words "shall not affect any proceedings commenced" and the argument appears to be that the expression "shall not affect" saves the right of appeal given by the old Code of Procedure, Act VIII of 1859, notwithstanding the express provisions of the new Code. But this section is clearly and literally capable of a construction which does not necessarily include an appeal, for the words "shall not affect any proceedings commenced" may be read with or without a limitation, that is, either to admit of its application to the full extent allowed by the law of procedure existing at the time of the passing of the General Clauses Act, or as limited by a subsequent Act, the provisions of which are on the face of them complete in themselves, although inconsistent with, because controlling, the full application of the former. On this principle of construction the expression "proceedings commenced" will have effect given to them up to the point where the new Act comes into operation, and then stop. And this is a reading of both Codes which is quite consistent with the ruling of the Bombay Court with respect to the period of imprisonment to be applied to judgment-debtors against whom process issued under the old Code, and in particular with the judgment of the Chief Justice, Sir Michael Westropp. For the warrant had issued under the old Code and execution of it had gone on for a considerable period, and there was therefore clearly a "proceeding commenced," if not something more. But an appeal

is a different matter. In the present case the "proceedings commenced" ended with the order dated the 22nd September 1877, and nothing in the new Act could invalidate them; but the appeal from that order was not taken till the 30th May 1878, and the opinion I hold under these circumstances is that such appeal must be determined by the new and not by the old Code: in other words, that the appeal is inadmissible. This it is obvious is the only construction that can make the two Acts consistent, but I think that for that reason, if for no other, it ought to be favoured and allowed by legal interpretation to supply the law.

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I have pointed out that there is nothing in s. 6 of the General Clauses Act about an appeal, and I have before shown that an appeal is not necessarily a mere stage in a suit, but a separate and independent proceeding, under the control of the parties, the original suit with the decree made in it being complete in itself and *pro tanto* finally operative. In the absence of express language, therefore, such a right of appeal is not, as an available stage in a suit, to be assumed, but ought to be expressly kept alive or expressly given. In the case of *Re v. The Justices of Surrey* (1), Ashurst, J., said:—"The power of appealing from the judgment of the justices seems to be of this kind" (*i.e.*, by special provision), "and does not attach without being expressly given." In another case, *Reg. v. The Recorder of Bath* (2), Lord Denman said:—"As it seems to us hardly possible to suppose it to have been the intention of the Legislature that an individual interested and aggrieved should not have the power of questioning the validity of a vote at the sessions, we cannot avoid noticing with regret that recourse should have been had to the method of giving an appeal by reference to another statute, instead of giving it plainly and directly by the statute itself." And so also in *Reg. v. Stock* (3) it was held that a right of appeal cannot be implied, but must be given by express words. These considerations appear to me to acquire even increased force when the principle of interpretation so applied is used, not for the mere purpose of taking away a right which previously existed, but for reconciling and making consistent two separate Acts of the same Legislature, instead of making them opposed to and contradictory of each other.

(1) 2 Term Reports, 504.

(2) 9 A. & E., 871.

(3) 8 A. & E. 405.

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Nor are we entitled to assume that the more recent Legislative measure, expressed as it is in language complete in itself, and capable of universal application, is of less weight and significance than a previous Act, the terms of which are loose and inexact. Any such assumption, indeed, would be opposed to every rule of construction that has ever been applied by the Courts to the combined interpretation of successive laws.

Such is the view I feel compelled to take of s. 528 of the new Code in relation to s. 6 of Act I of 1868, and it is a view which appears to me to be fully borne out by the general character and objects of the Code. That Code is Act X of 1877, entitled "An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature;" and the preamble is: "Whereas it is expedient to consolidate and amend *the laws* relating to the Courts of Civil Judicature." By the expression "the laws" in these two quotations I understand *all* the laws, and there is thus afforded, as it appears to me, a key to the solution, to a considerable extent, of the legal question now raised. As I have stated, there can, I imagine, be no question that it means all the laws in operation at the time of passing of the new Code, and therefore, not only the old Code, Act VIII of 1859, and the supplementary Act, XXIII of 1861, but the General Clauses Act, I of 1868, are here meant, for it could not have been intended that these laws were to be "amended" by being allowed to stand in their original condition, and in that condition to contradict, if not to abrogate, the provisions of the new law which purports to amend them. And this meaning and effect of the title and preamble, and especially of the preamble, of the Code, must be understood to overlie the whole Act, giving colour to and controlling its provisions, and by showing the intention of the Legislature supplying *pro tanto* the rule for the interpretation of these provisions. For if one thing is more clear than another, and beyond all doubt it is the distinct intention of the Legislature by this Code to abolish these second appeals from orders, and that intention being clear, it ought not to be defeated by the strained application of general expressions of a loose and doubtful nature contained in a previous law, such as the General Clauses Act.

For these reasons I am of opinion that a second appeal in the case before me does not lie, and I must refuse to admit it.

*Before Mr. Justice Pearson and Mr. Justice Turner.*

1878

November 28.

**MURLI DHAR (JUDGMENT-DEBTOR) v. PARBOTAM DAS AND ANOTHER  
(DECREE-HOLDERS).\***

*Execution of decrees—Appeal from Order—Assignment of Decrees—Cross-Decrees  
—Act X of 1877 (Civil Procedure Code), ss. 2, 232, 233, 246, 540.*

An order made in the execution of a decree disallowing the objections taken by the judgment-debtor to execution of the decree being taken out by a transferee by assignment of the decree, being the final order in a judicial proceeding, and therefore a "decree" within the meaning of s. 2 of Act X of 1877, is appealable under that Act. *Thakur Prasad v. Akbar Ali* (1) followed.

*S* and two other persons held a decree for costs against *M*, which did not specify the separate interests of each in the decree, and *M* held a decree for money against *S* alone, which he wished to treat as a cross-decree under s. 246 of Act X of 1877. *Held* that the decree held by *S* and the other persons was not a decree between the same parties as the parties to the decree held by *M*, and *M*'s decree could not therefore be treated as a cross-decree under that section.

THE facts of this case were as follows :—One Murli Dhar preferred an appeal to the High Court from an original decree, which appeal the High Court dismissed, giving the respondents a decree against Murli Dhar for Rs. 682-9-0, being the amount of costs incurred by them in the High Court. Sarju Prasad, one of the respondents, transferred this decree to Parsotam Das and Sital Prasad by assignment, who applied for its execution as the transferees. Murli Dhar objected, but his objections were disallowed by the Court of first instance, the Subordinate Judge of Azamgarh, the Court executing the decree. He appealed to the High Court, contending that he held a decree for money against Sarju Prasad, the assignor of the decree under execution, of which he was entitled to set off a portion of the amount against the amount of the decree under execution.

*Munahi Kasi Prasad and Ram Prasad*, for the appellant.

*Lala Lalta Prasad*, for the respondents.

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\* First Appeal, No. 6 of 1878, from an order of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 1st October, 1877.

(1) I. L., R., 1 All., 668.

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v.  
PARSOTAM  
DAS.

The High Court remanded the case for the trial of the issue set out in the order of remand, which was as follows :—

TURNER, J.—The opinion of the Full Bench (1) established that an appeal lies in this case, the order being the final order in a judicial proceeding, and therefore a decree as defined in s. 2.

Sarju Prasad was competent to sell his title to the costs which he anticipated he would recover, and there can be no objection to the validity of the substitution of the names of the respondents for that of Sarju Prasad. Of course the respondents took the decree for costs subject to any equities which may have subsisted between the decree-holder and the judgment-debtor (2). The appellant then was entitled to set off so much of any valid and subsisting decree held by him against Sarju Prasad as might amount to the decree purchased by the respondents (3). The lower Court must determine whether, as alleged by the appellant, he held a decree of which he was entitled to set off a portion of the amount against the decree acquired by the respondents so as to satisfy the decree held by respondents. The lower Court will try this issue and return its finding to this Court, when ten days will be allowed for objections.

From the finding of the lower Court it appeared that the decree held by Murli Dhar was one for money against Sarju Prasad alone made by the Subordinate Judge of Benares, which had been transferred to the Court of the Subordinate Judge of Azamgarh for execution. On the return of the finding the following judgment was delivered by the High Court (PEARSON, J., and TURNER,) :

TURNER, J.—The Court below has found that the decree in which the respondents purchased the interests of Sarju Prasad was a decree for costs held by Sarju Prasad and two other persons without any specification of the separate interests of each. We are compelled to hold then that the decree is not a decree between the same parties as the parties to the decree held by the appellant, inasmuch as in the latter decree Sarju Prasad is the sole judgment-debtor. We must consequently dismiss the appeal, but we order each party to bear his own costs.

*Appeal dismissed.*

(1) I. L. R., 1 All., 668.

(2) See s. 233 of Act X of 1877.

(3) See s. 246 of Act X of 1877, Explanation ii.

*Before Mr. Justice Pearson and Mr. Justice Spinkie.*

1878  
December 9.

JIWAN BAKHSH (DEFENDANT) v. IMTIAZ BEGAM (PLAINTIFF).\*

*Muhammadian Law—Gift.*

A defined share in a landed estate is a separate property, to the gift of which the objection which attaches under Muhammadan law to the gift of joint and undivided property is inapplicable.

THIS was a suit in which the plaintiff, the daughter of one Ilahi Bakhsh, deceased, sued to set aside a gift of her father's estate made by him in his lifetime to the defendant, his eldest son, and for possession of her share, under the Muhammadan law of inheritance, in such estate. The gift to the defendant by his father comprised, amongst other property, one-third shares in certain joint and undivided zamindari villages. As the holder of these shares the defendant's father was entitled to a one-third share of the profits of the villages, after payment of the Government revenue, village expenses, and costs of collection. The plaintiff contended that the gift of these shares was invalid on the ground that the gift of "*musha*," or an undivided part in property capable of partition, was invalid according to Muhammadan law. The Court of first instance held, referring to *Ameo-on-nissa Khatoon v. Abad-on-nissa Khatoon* (1), that the shares were separate property, and disallowed the plaintiff's contention. On appeal by the plaintiff the lower Appellate Court held that the shares were joint and undivided property, and that the gift of them was consequently invalid under Muhammadan law.

The defendant appealed to the High Court, contending that the gift of the shares was not invalid.

Mr. Conlan and Lala Latta Prasad, for the appellant.

Pandit Bishambar Nath and Mir Zahur Husain, for the respondent.

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\* Second Appeal, No. 504 of 1878, from a decree of W. Tyrrell, Esq., Judge of Bareilly, dated the 27th September, 1877, modifying a decree of Maulvi Muhammad Maqsood Ali Khan, Subordinate Judge of Bareilly, dated the 7th May, 1877.

(1) 15 B. L. R., 67; 23 W. R., 208.



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JIWAN  
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v.  
IMTIAZ  
BEGAM.

The judgment of the Court, so far as it related to this contention, was as follows:—

PEARSON, J.—The main question raised by this appeal is whether the gift of a defined share of landed estates is open to the objection which attaches, under Muhammadan law, to the gift of joint and undivided property. On this question our opinion is in accord with that of the Court of first instance that a defined share in a landed estate is a separate property to the gift of which that objection is inapplicable, and we conceive that the view of the matter which we take in common with the Subordinate Judge is sanctioned by the rulings of the Privy Council as well as well-founded in reason.

*Before Mr. Justice Turner and Mr. Justice Spinkie.*

SHAFI-UD-DIN AND OTHERS (PLAINTIFFS) v. LOCHAN SINGH AND ANOTHER (DEFENDANTS.\*)

1878.  
December 16.

*Execution of Decree—Resistance to Execution—Act X of 1877 (Civil Procedure Code), s. 332—Act VIII of 1859 (Civil Procedure Code) s. 230—Repeal.*

A mortgagee who is in possession of the mortgaged property under the mortgage is in possession "on his own account" within the meaning of s. 230 of Act VIII of 1859 and s. 332 of Act X of 1877.

Where, in pursuance of an order made in the execution of a decree while Act VIII of 1859 was in force, certain persons were dispossessed of certain property after that Act was repealed and Act X of 1877 came into force, and such persons applied under s. 332 of Act X of 1877 to be restored to the possession of such property on certain of the grounds specified in that section, *held* that such persons were entitled to the benefit of that section.

A person claiming under s. 332 of Act X of 1877 need not prove his title but only the fact of possession.

THE facts of this case were as follows:—On the 17th February 1876 one Mahtab Singh and his two brothers mortgaged a certain village, which they held as a joint and undivided estate, to Shafi-ud-din and two other persons, putting the mortgagees into possession of the entire village. On the 7th August 1877 Lochan Singh and Beni Singh, the sons of Mahtab Singh, obtained a decree against their father for the partition and possession of two-thirds of the

\* Second Appeal, No. 506 of 1878, from a decree of W. Tyrrell, Esq., Judge of Bareilly, dated the 2nd May 1878, reversing a decree of Maulvi Muhammad Maqsood Ali Khan, Subordinate Judge of Bareilly, dated the 19th December 1877.

estate. On the 13th November 1877, or after Act X of 1877 came into force, the mortgagees were dispossessed of two-thirds of the estate under an order made in the execution of the decree above mentioned on the 17th September 1877, or before Act X of 1877 came into force. The mortgagees subsequently applied under s. 332 of Act X of 1877 to the Court executing the decree to be restored to the possession of the property, disputing the right of the decree-holders to dispossess them under the decree, on the ground that they were in possession on their own account, and that they were not parties to the suit in which the decree was made. This application was numbered and registered as a suit between the parties in accordance with that section. The Court granted the mortgagees an order for the possession of the property. On appeal by the defendants the lower Appellate Court reversed the order of the Court of first instance on the ground that the suit was not one which could be brought under s. 332 of Act X of 1877, inasmuch as the mortgagees derived their title from the judgment-debtor, and it could not therefore be said that they were in possession on their own account

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SINGH.

The mortgagees appealed to the High Court against the order of the lower Appellate Court.

*Mr. Conlan* and *Mir Zakur Husain*, for the appellants.

*Pandit Ajudhia Nath* and *Lala Harkrishen Das*, for the respondents.

The judgment of the Court was delivered by

TURNER, J.—The grounds on which the Judge has dismissed the suit cannot be sustained: the mortgagees were in possession on their own account. The question then arises whether in this suit the mortgagees may rely on their possession only and claim to be restored to possession, or whether they must prove their title. Seeing that they were not actually dispossessed until November, 1877, when Act X of 1877 was in force, it appears to us that they were entitled to the benefit of s. 332 of that Act. It is true that the order under colour of which the decree-holders ousted them was passed before the Act came into operation, but until the ejection of the mortgagees no right accrued to them to oppose the misuse of the order, and when that right accrued it is governed by the law then in force. We decree

1878 the appeal, and reversing the decree of the lower Court restore that of  
 SHAFI-UD-DIN v. LOCHAN SINGH. the Court of first instance with costs.

The respondents are of course at liberty in a suit properly instituted to try the question of title and to apply for the ejectment of the appellants.

1878  
 December  
 19.

*Before Mr. Justice Turner and Mr. Justice Oldfield.*

KARAN SINGH (DEFENDANT) v. RAM LAL (PLAINTIFF).\*

*Act VIII of 1871 (Registration Act, ss. 17, cl. (2), 49—Registration—Mortgage.*

A bond for the payment of Rs. 83-8-0 on demand together with interest thereon at the rate of two per cent. per mensem, which charges immovable property with such payment, does not, though the amount due on it may in time exceed Rs. 100, purport to create an interest of the value of Rs. 100, within the meaning of the Registration Act, and its registration is therefore optional (1).

THIS was a suit for Rs. 116-6-0, being the principal money and interest payable thereon due on a bond dated the 3rd August, 1876. This bond, which was not registered, secured the payment on demand of Rs. 83-8-0, together with interest on that sum at the rate of Rs. 2 per cent. per mensem, and charged certain immovable property with such payment. The plaintiff asked for a decree for the sale of the property, making the auction-purchaser of it a defendant in the suit. The plaint in the suit stated that payment of the sum due on the bond was demanded on the 31st December, 1877. The Court of first instance held that, inasmuch as on that date the sum due on the bond exceeded Rs. 100, the bond operated to create an interest in immovable property of the value of upwards of Rs. 100, and its registration was therefore compulsory, and being unregistered it could not affect the property comprised in it. It consequently refused to give the plaintiff a decree for the sale of the property. On appeal by the plaintiff the lower Appellate Court held that the registration of the bond was not compulsory and remanded the suit for a re-trial.

\*Second Appeal, No. 69 of 1878, from an order of Maulvi Farid-ud-din Ahmed, Subordinate Judge of Aligarh, dated the 15th June, 1878, reversing a decree of Munsbi Mohan Lal, Munsif of Aligarh, dated the 30th April, 1878.

(1) See also *Narasayya Chetti v. Guruswappa Chetti*, I. L. R., I Mad., 378.

The auction-purchaser appealed to the High Court from the order of the lower appellate Court, contending that the registration of the bond was compulsory, inasmuch as when it was executed it was probable that it would create an interest in the property comprised in it of the value Rs. 100.

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KARAN  
SINGH  
v.  
RAM LAL.

Pundit *Ajudhia Nath* and Babu *Oprokash Chandar*, for the appellant.

The respondent did not appear.

The judgment of the Court was delivered by

TURNER, J.—We see no reason to depart from the view of the law we have long held in this Court. The bond was for a sum of Rs. 83-8-0 payable on demand with interest. It did not certainly secure Rs. 100, and therefore its registration was optional. The appeal is dismissed.

*Before Mr. Justice Turner and Mr. Justice Spankie.*

1879  
January 24.

INAYAT KHAN (PLAINTIFF) v. RAHMAT BIBI (DEFENDANT).\*

*Suit for rent of the nature cognizable in a Small Cause Court—Determination of Title—Res judicata.*

The incidental determination of an issue of title in a suit for rent of the nature cognizable in a Court of Small Causes does not finally estop the parties to such suit from raising the same issue in a suit brought to try the title (1).

THE facts of this case were as follows: In 1872 one Digambari sued Rahmat Bibi in the Court of the Munsif of Mirzapur for Rs. 7-5-0, being the "*parjote*" or ground-rent of a house situated in Wellesley Ganj, in the city of Mirzapur, belonging to and occupied by Rahmat Bibi. Rahmat Bibi, who had acquired the house by purchase, set up as a defence to this suit, amongst other things, that the plaintiff was not entitled to the rent claimed, the land being rent-free, and "*abadi*" land in the city of Mirzapur not being liable to the payment of ground-rent. The Munsif gave the

\* Application, No. 8 of 1878, for a review of the judgment in Second Appeal, No. 896 of 1877, decided the 6th December 1877.

(1) See also *Raghu Ram Biswas v. Sunkur Lall Pattuck v. Ram Kalre, Ram Chandra Dobey*, B. L. R., Sup. 18 W. R., 104. Vol. 34; S. C., W. R. Sp. 127; and

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plaintiff a decree, finding that ground-rent had been paid to the plaintiff for the land. The District Judge, on the 24th December 1872 on appeal by the defendant, dismissed the suit, his reasons for so doing as stated in his judgment being as follows: "The respondent (Digambari) does not allege that it is the custom to claim "*parjote*" rent, nor does she show any paper or document by which she could claim such a rent: she is not a zemindar, and there is nothing on record to show that she or her ancestors ever possessed the right to claim such a rent." The plaintiff appealed to the High Court against the decree of the District Judge, but her appeal was rejected by the High Court on the ground that the suit was of the nature cognizable in a Court of Small Causes, and therefore no special appeal would lie. In August 1876 the present suit was instituted in the Court of the Munsif of Mirzapur by the representative of Digambari against Rahmat Bibi, in which he claimed to establish his right to receive ground-rent in respect of the same house at a certain rate, and also claimed arrears of such rent at that rate. Both the Munsif, and the District Judge, on appeal to him by the defendant, gave the plaintiff a decree, both officers holding that the question whether the plaintiff was entitled to ground-rent in respect of the house was not *res judicata*, with reference to the decision of the District Judge dated the 24th December 1872.

On appeal by the defendant to the High Court it was contended by her that that question was *res judicata*, with reference to that decision. The High Court (TURNER, J., and SPANKIE, J.), on the 6th December 1877, allowed the defendant's contention, and dismissed the plaintiff's suit.

The plaintiff applied for a review of the judgment of the High Court on the ground that a question of right could not be determined finally in a suit of the nature cognizable in a Court of Small Causes.

Munshi Kashi Prasad and Lala Lalla Prasad, for the petitioner, respondent.

Munshis Hanuman Prasad and Sukh Ram, for the opposite party, appellants.

The High Court (TURNER, J., and SPANKIE, J.) delivered the following judgment in review of its former judgment:

**TURNER, J.**—The respondent's pleader, in support of his application for a review of judgment, has adduced a precedent of this Bench (1), which, it must be admitted, is in his favour. On reconsideration of the point raised, we are of opinion that the application for review should be granted. The former suit between the parties was a suit for rent cognizable by a Court of Small Causes, and the special appeal presented against the decree of the lower appellate Court in that suit was rejected on the ground that the suit was of that character. In a suit for rent instituted in a Small Cause Court the question of title would only be determined incidentally. It appears to us that it would be inequitable to rule that no special appeal lies in a suit of such a nature when instituted in a Civil Court, and nevertheless to hold that the decision of the issue of title in the trial of such a suit should finally estop the parties from raising the same issue in a suit brought to try the title. For these reasons, and following the precedent quoted, we allow the review of judgment, and inasmuch as no other point arises in the special appeal than the point already argued at the hearing of the application, we proceed to dispose of the appeal.

The only objection taken to the decrees of the Courts below proceeding on the contention that the issue respecting title was finally determined in the former proceedings, and that the parties are concluded by the former finding on that issue, we overrule the objection and dismiss the appeal with costs, including the costs of the application for review.

*Appeal dismissed.*

*Before Mr. Justice Pearson and Mr. Justice Turner.*

**ZAHUR (DEFENDANT) v. NUR ALI (PLAINTIFF).\***

*Muhammadian Law—Pre-emption.*

Where a dwelling-house was sold as a house to be inhabited as it stood with the same right of occupation as the vendor had enjoyed, but without the ownership of the site, *held* that a right of pre-emption under Muhammadian law attached to such house.

THE facts of this case, so far as they are material for the purposes of this report, were as follows: The plaintiff claimed to

(1) Unreported

\* Second Appeal, No. 875 of 1878, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 14th May 1878, reversing a decree of Maulvi Asmat Ali Khán, Munsif of the City of Gorakhpur, dated the 23rd February 1878.

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enforce his right of pre-emption under Muhammadan law in respect of a dwelling-house, situated in a certain mohalla in the city of Gorakhpur, basing his claim on vicinage. The vendee, who alone defended the suit, set up as a defence to it, amongst other things, that the plaintiff had not asserted his right of pre-emption in the manner required by Muhammadan law, that is to say, that he had not made the "*talab-i-mawasabat*," or immediate claim to the right of pre-emption, and the "*talab-i-ishhad*," or affirmation by witness, and that his claim was consequently invalid. The Court of first instance dismissed the suit, finding that the plaintiff had not complied with the requirements of the Muhammadan law. On appeal by the plaintiff the lower appellate Court was of opinion that the plaintiff had complied with the requirements of that law, and gave him a decree.

The vendee appealed to the High Court, contending that the sale of the house without the site did not give the plaintiff a right of pre-emption under Muhammadan law.

Babu *Sital Prasad Chatterji* and Maulvi *Mehdi Hasan*, for the appellant.

Lala *Lalta Prasad* and Babu *Jogindro Nath Chaudhri*, for the respondent.

The judgment of the High Court, so far as it related to this contention, was as follows :

TURNER, J.—The parties are Muhammadans, and under the law administered here they can claim pre-emption on all sales of property made between the members of their creed, when the property is of the description to which by their law pre-emption attaches. It is contended that to the property in suit pre-emption does not attach, and passages are cited from the *Hedāya* and other works (1) to show that, when a house is sold apart from land, pre-emption does not attach, and it is argued that, inasmuch as the seller had no right in the land, all he could sell was the house.

In fact and in law this contention appears erroneous. The seller not only sold the materials of the house, but such interest as

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(1) See Baillie's Digest of Muhammadan law, pp. 473, 474, 475.

he possessed as an occupier of the soil. The house was sold as a house to be inhabited on the spot with the same right of occupation as the seller had enjoyed.

The text on which the appellant relies applies to the sale of the materials of a house or a house capable of and intended to be removed from its site. It is then equally moveable property as goods, boats, or trees, cut or sold to be cut and carried away, but it does not apply to a house sold with the right of occupation of the soil. The appeal fails and is dismissed with costs.

*Appeal dismissed.*

## CRIMINAL JURISDICTION.

1879  
January 24.

*Before Mr. Justice Turner.*

### EMPRESS OF INDIA v. BUDH SINGH.

*Act XLV of 1860 (Penal Code), ss. 425, 441—Act X of 1872 (Criminal Procedure Code), s. 454—Criminal Trespass—Mischief.*

If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right, and without any intention to intimidate, insult, or annoy such other person, or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass (1).

So also, if a person deals injuriously with property in the *bona fide* belief that it is his own, he cannot be convicted of mischief (2).

The mere assertion, however, in such cases of a claim of right is not in itself a sufficient answer to charges of criminal trespass and mischief. It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming that the other facts are established which constitute the offence.

Where a person committed a trespass with the intention of committing mischief, thereby committing criminal trespass, and at the same time committed mischief, *held* that such person could not, under cl. iii of s. 454 of Act X of 1872, receive a punishment more severe than might have been awarded for either of such offences. The provisions of that law do not in such a case prohibit the Court from passing sentence in respect of each offence established.

(1) See also *In the Matter of Shistidhar Parui*, 9 B. L. R., Ap. 19; S. C., 18 W. R. Cr. 25, where it was held that a person exercising a supposed right of fishery in a *bona fide* manner without any intent to intimidate, insult, or annoy, or to commit

an offence, could not be convicted of criminal trespass; and see also the observations of Markby, J., in *The Queen v. Surwan Singh*, 11 W. R. Cr. 11.

(2) See also *Bakar Halsana v. Dinobhandu Biswas*, 3 B. L. R., A. Cr. 17.



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THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioner was convicted on the 12th June 1878 by Mr. H. B. Joyce, Magistrate of the first class, of committing criminal trespass and mischief. On appeal by the petitioner to the Sessions Judge, Mr. W. C. Turner, this conviction was affirmed on the 17th August 1878. The facts of the case and the grounds on which the petitioner applied for revision are sufficiently stated, for the purposes of this report, in the judgment of the High Court.

Mr. L. Dillon, for the petitioner.

The *Junior Government Pleader* (Babu Dwarka Nath Benarji), for the Crown.

TURNER, J.—It is found that the petitioner, in order to appropriate the wall of his neighbour, the complainant, to which he knew he had no right whatever, caused workmen to cut niches in the wall, to lay rafters on the wall, and to put water-spouts in the wall; and that he also caused workmen to remove bricks belonging to the complainant from the yard of the complainant and to place them on the wall, in order to form a parapet for buildings he was erecting on the other side of the wall; and that he threatened the complainant with violence when he attempted to interfere to protect his property. The Magistrate on these findings convicted the petitioner of criminal trespass and of mischief, and sentenced him in respect of each offence to pay a fine of Rs. 100, and in default to undergo simple imprisonment for fifteen days. In appeal the Sessions Judge affirmed the convictions and sentences.

Revision of the orders of the Courts below is now sought on the following grounds: It is argued that the offence of criminal trespass has not been established because the petitioner did not enter on the premises of the complainant with the intent of insulting, intimidating, or annoying the complainant, nor with the intent to commit an offence, but with the intent of benefiting himself. It is also argued that the offence of mischief is not established because the petitioner did not cause the destruction of any property nor any change in such property, or in the situation thereof, as destroyed or diminished its value or utility, and that, if

he did so, he did not do so with the intent of causing wrongful loss or damage to the complainant but of benefiting himself. It is argued in respect of both charges that the complainant should have been referred to the Civil Court, and that the Criminal Court should not have entertained them ; and lastly it is contended that, inasmuch as it has been found it was the object of the criminal trespass to commit the offence of mischief, the petitioner could not legally receive a double punishment.

The objection that the Criminal Courts ought to have declined jurisdiction because the petitioner set up a claim to the wall and to the bricks cannot be sustained on the findings of the Magistrate.

If a person enters on land in the possession of another in the exercise of a *bond fide* claim of right, but without any intention to intimidate, insult, or annoy the person in possession, or to commit an offence, then although he may have no right to the land he cannot be convicted of criminal trespass, because the entry was not made with any such intent as constitutes the offence. So also if a person deals injuriously with property in the *bond fide* belief that it is his own he cannot be convicted of the offence of mischief, because his act was not committed with intent to cause *wrongful* loss or damage to any person. But the mere assertion of a claim of right is not in itself a sufficient answer to such charges. It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bond fide* claim of right, then it cannot refuse to convict the offender, assuming of course that the other facts are established which constitute the offence.

In the case before the Court the Magistrate in effect finds not only that the petitioner had no right, but that he could not have been ignorant that he had no right. The facts found by the Magistrate show that the petitioner caused a change in the property of the complainant which affected it injuriously, nor is it any answer to the charges on which the petitioner has been convicted that the petitioner's intention was to benefit himself. That benefit was to be acquired as he must have known by causing wrongful loss to the complainant. The objections taken by the petitioner's pleader to the propriety of the convictions cannot be sustained. I may,

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however, observe that, inasmuch as the acts of trespass and mischief were committed not by the petitioner himself but his workmen at his instigation, he would more properly have been convicted of the abetment of the offences, but there being no difference in the punishment to which he would be liable it is unnecessary to interfere with the convictions on this ground.

It remains for me to deal with the objection to the punishment. It must be admitted that the object of the trespass was to commit the "mischief" imputed to the petitioner, and consequently under the third clause of s. 454 of the Code of Criminal Procedure, as explained by the illustrations, the petitioner must not receive a punishment more severe than might have been awarded for either of those offences. This provision of the law does not, as the petitioner's pleader suggests, prohibit the Court from passing sentence in respect of each offence established, but it declares that the offender must not receive for such offences collectively a punishment more severe than might have been awarded for any one of them, or for the offence formed by their combination. Where an offence is constituted by the combination of other offences or includes another offence, sentence should ordinarily be passed on the charge relating to that offence only, but the law does not prohibit several sentences, so that collectively they do not exceed the prescribed limit. For the offence of criminal trespass the maximum punishment sanctioned by the Penal Code is imprisonment for a term of three months and fine to the extent of Rs. 500. The imprisonment in default of payment of fine must therefore be limited to one-third of three months. The maximum punishment for the offence of mischief is imprisonment for three months and fine without limit, but the imprisonment in default of payment of fine is limited to one-third of the term of imprisonment. The Magistrate has sentenced the petitioner to pay two fines each of Rs. 100, or collectively less than the amount of fine which might be imposed for either offence, and in default of the payment of each fine to undergo imprisonment for the term of fifteen days. The Magistrate has not declared that the terms of imprisonment are to be undergone the one on the expiry of the other, and if default were made in the payment of both fines the sentences would run concurrently, so that in the whole the punishment would not exceed the punishment allowed by the law for either of

the offences of which the petitioner has been convicted. I therefore see no reason to interfere.

*Application dismissed.*

*Before Mr. Justice Turner.*

EMPRESS OF INDIA v. MULA.

*Attempt—Fabricating False Evidence—Act XLV of 1860 (Penal Code), ss. 193, 511.*

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*M* instigated *Z* to personate *C* and to purchase in *C*'s name certain stamped paper, in consequence of which the vendor of the stamped paper endorsed *C*'s name on such paper as the purchaser of it. *M* acted with the intention that such endorsement might be used against *C* in a judicial proceeding. Held that the offence of fabricating false evidence had been actually committed, and that *M* was properly convicted of abetting the commission of such offence. *Queen v. Ramsaran Chowbey* (1) distinguished and observed on.

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. On the 24th August 1878 the petitioner was convicted by Mr. J. Kennedy, Officiating Magistrate of the district of Sháhjahánpur, of attempting to fabricate false evidence. On appeal by the petitioner to the Officiating Sessions Judge, Mr. W. Duthoit, that officer, on the 18th September 1878, being of opinion that the offence of fabricating false evidence had been actually committed, and that the petitioner had abetted such offence, altered the conviction accordingly. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *L. Dillon*, for the petitioner, contended that the offence of fabricating false evidence had not been completed. He referred to *Queen v. Ramsaran Chowbey* (1).

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

TURNER, J.—The petitioner Mula is a money-lender in Sháhjahánpur, with whom Chattar Singh, *thakur*, had had dealings, but prior to the date of the occurrence which led to the present charge Chattar had discharged his debt to the petitioner. In a suit instituted by Mula against Netha and Dhaunkal, Chattar gave evidence on behalf of the defendants, and thereupon Mula threatened him he

(1) H. C. R. N.-W. P., 1872, p. 46. As to other facts which it was held would justify a conviction for an attempt to fabricate false evidence, see *Queen v. Nunda*, H. C. R., N.-W. P., 1872, p. 133.

As to an attempt to commit bigamy, see *Queen v. Peterson*, I. L. R., 1 All., 316. As to an attempt to commit mischief by fire, see *Queen v. Dayal Bawri*, 3 B. L. R., A. Cr. 56.

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would make him pay Rs. 50. On the 28th July Zabar, a debtor of Mula, applied to Mathura Prasad for a stamp of the value of four annas. He gave his name as Chattar Singh, *thakur*, and the name of Chattar Singh's father, and also Chattar Singh's address. These details were, in accordance with the usual practice, endorsed on the back of the stamp. As Zabar was leaving the stamp-vendor's shop, it occurred to the stamp-vendor again to question him as to his name. He then made a mistake and gave a different name as the name of Chattar Singh's father. The suspicions of the stamp-vendor being excited, he further questioned Zabar, who then stated he had purchased the stamp at the request of Mula, who had given him four annas for that purpose. The stamp-vendor very properly took Zabar to the police-station and reported what had occurred. It is shown by other evidence, which the Courts below have accepted as reliable, that Mula gave four annas to Zabar and requested him to purchase a stamp; that he left his place of business and accompanied Zabar on his way to the stamp-vendor's; that he remained near the stamp-vendor's shop when Zabar entered it, and ran away on perceiving that Zabar was detained. With this corroboration the Magistrate and the Sessions Judge have accepted as reliable the statement of Zabar that he was induced by Mula to personate Chattar Singh, and to procure the stamp in Chattar Singh's name. The Magistrate held that on the facts proved Mula was guilty of the offence of attempting to fabricate false evidence for the purpose of using it in judicial proceedings. The Sessions Judge more correctly held that the facts afforded proof that the fabrication was complete, and that the petitioner was liable to conviction for abetment of the offence alleged rather than of an attempt to commit it, and amended the conviction accordingly. In this Court it is argued that, although the petitioner may have made preparations to commit the offence, yet the offence had not actually been completed, and in support of this contention the petitioner's pleader has referred to *Queen v. Ramsaran Choubey* (1), in which case it was held that under similar circumstances the accused could not be convicted of forgery.

It appears to me that the cases may be distinguished. The endorsement of the stamp-vendor forms no part of the document

(1) H. C. R., N.-W. P., 1872, p. 46.

which it may be assumed it was the intention of the person who procured the endorsement to make on the face of the stamp-paper. The offence of forgery had therefore not proceeded beyond the stage of preparation, but in the case now before the Court there had been an actual fabrication : something had been done. It is true that no judicial proceeding had been instituted, but the petitioner's pleader is unable to suggest any other object for which the false endorsement should have been procured. The petitioner had undoubtedly threatened Chatter Singh that he would make him pay Rs. 50. He could not have carried out his threat without the intervention of the Court. The object of the endorsement made by the vendor of a stamp is to afford proof of the person to whom it is sold, and in suits brought on documents written on stamp-paper it is the usual course, when the execution of the document is denied, to advert to the endorsement and to the stamp-vendor's memory assisted by the endorsement as evidence of the person to whom the stamp was sold, and therefore as evidence of the probability that the document was made by the person by whom the paper was procured. I do not say that in the case cited the accused should have been discharged. Had the point been taken the Court might have held the accused guilty of the offence of which the petitioner has been convicted, but I am of opinion that in the case before the Court the evidence for the prosecution warranted the inference that the petitioner procured the false endorsement for the purpose of thereafter using it in a judicial proceeding, and consequently that the conviction is not open to the objection taken to it. I affirm it, and dismiss the application.

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*Application dismissed.*

## APPELLATE CIVIL.

*Before Mr. Justice Turner and Mr. Justice Spinkie.*

THE COURT OF WARDS ON BEHALF OF THE RAJA OF KANTIT  
(PLAINTIFF) v. GAYA PRASAD AND OTHERS (DEFENDANTS).\*

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January 28.

*Substitution or addition of new Appellant or Respondent—Act XV of 1877  
(Limitation Act), s. 22—Appellate Court, Powers of—Sale in Execution*

\* Second Appeal, No. 517 of 1878, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 11th March 1878, reversing a decree of Mirza Abid Ali Beg, Subordinate Judge of Mirzapur, dated the 27th November 1877.

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*of Decree—Act VIII of 1859 (Civil Procedure Code), ss. 256, 257—Suit for recovery of purchase-money—Caveat Emptor—Irregularity.*

An appellate Court has discretionary power to substitute or add a new appellant or respondent after the period of limitation prescribed for an appeal.

The right, title, and interest of *G* in certain immoveable property was attached and notified for sale in the execution of a money-decree held by *T*. It was also attached and notified for sale in the execution of a money-decree held by *S* and *R*. The same date was fixed for both sales. The officer conducting sales first sold the property in execution of *T*'s decree, and *T* purchased the property. He then sold the property in execution of the decree held by *S* and *R*, and *K* purchased the property. The Court executing the decrees confirmed the sale to *T*, granting him a sale-certificate, and disallowing *K*'s objection to the confirmation. It also confirmed the sale to *K*, ordering the purchase-money to be paid to *S* and *R*, and disallowing *K*'s objection to the confirmation; but it refused to grant *K* a sale-certificate on the ground that, as the sale to *T* had been confirmed and a sale-certificate granted to him, it could not give *K* possession of the property. In a suit by *K* against *S* and *R* to recover his purchase-money, *held*, distinguishing the suit from the cases in which it had been held that, when the right, title, and interest of a judgment-debtor in a particular property is sold, there is no warranty that he has any right, title, or interest, and therefore the auction-purchaser cannot recover his purchase-money if it turns out that the judgment-debtor had no interest in the property, that the rule of *caveat emptor* did not apply, and the suit was maintainable.

The provisions of s. 257 of Act VIII of 1859 apply to applications made under s. 256 of that Act and to those only.

*Held* therefore that, inasmuch as *K* objected to the confirmation of the sale to him on the ground that the Court was not competent to confirm a sale which had by its previous order been nullified, and not on any of the grounds mentioned in s. 256 of Act VIII of 1859, *K* was not precluded by the terms of s. 257 of that Act from maintaining his suit.

Where the Court executing two decrees made separate orders directing the sale on the same date of certain immoveable property in execution of such decrees, the officer conducting sales was not bound to sell such property once for all in execution of both decrees, and his selling such property separately was therefore not an irregularity in the conduct of the sales.

THIS was an appeal from an appellate decree dated the 11th March 1878. This appeal was filed on the 31st May 1878, the original respondents being Gaya Prasad and Girdhari Prasad, two of the defendants in the suit out of which the appeal arose. On the 28th June 1878 a *vakalat-nama* was filed appointing a pleader to defend the appeal on behalf of Ram Manorath, the third defendant in the suit. On the 22nd August 1878 an application was made to the High Court on behalf of the appellant in which it was

stated that by an oversight Ram Manorath had not been made a party to the appeal, and praying that, as he had appeared to defend the appeal, he might be made a respondent. On the same date the Court (Oldfield, J.) made an order in accordance with this application. The remaining facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

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The *Senior Government Pleader* (Lala Juala Prasad), for the appellant.

Pandit *Ajudhia Nath*, for the respondents.

The judgment of the Court was delivered by.

TURNER, J.—The first question arising in this appeal is whether or not the appeal so far as it affects Ram Manorath is barred by limitation. By some carelessness he was not at first made a respondent, and the period prescribed for appeal had expired before he was brought on the record as a respondent. By the 22nd section of the Limitation Act it is provided that when after the institution of a suit a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party. There is no analogous provision with respect to appeals, and therefore it is competent to the Court to exercise its discretion in allowing a party to be added to the record after the period prescribed for the admission of an appeal has elapsed. The lower appellate Court throughout its judgment alludes to the decree held by Gaya Prasad and Ram Manorath as “the decree of Gaya Prasad,” and omits any mention of Ram Manorath, and this circumstance may have led the appellant’s pleader to suppose that Ram Manorath was not a material party to the appeal, as the appeal was in other respects filed within time and prosecuted with due diligence. We are not prepared to set aside the *ex-parte* order for making Ram Manorath a respondent to the appeal.

The circumstances which have led to the present proceedings are as follows : The rights and interests of Girdhari Prasad Singh in mauza Tilai were attached and advertised for sale, under separate orders, in execution of a decree held by Thakur Sayal and in execution of a decree held by Gaya Prasad and Ram Manorath. The same



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date, the 20th September, was fixed for the sale in execution of both decrees. On the 20th September the officer conducting the sale at first put up the property in execution of the decree of Thakur Dayal, which it would appear was entitled to priority of satisfaction, and the property was purchased by the decree-holder. He then again put up the property for sale in execution of the decree of Gaya Prasad and Ram Manorath, and it was purchased by the agent of the appellant. The Court executing the decrees confirmed the sale in execution of Thakur Dayal's decree, and delivered a sale-certificate to the auction-purchaser. It also confirmed the second sale, and ordered the purchase-money to be paid to the decree-holder, but it held that, inasmuch as the sale to the purchaser in execution of Thakur Dayal's decree had already been confirmed and a certificate issued, it could not give possession to the appellant as the purchaser in execution of the decree of Gaya Prasad and Ram Manorath, and therefore refused to grant a certificate in respect of that sale.

The appellant instituted the present proceedings to obtain a refund of the purchase-money paid under the second sale. The Court of first instance decreed the claim on the ground that although the property ought to have been put up for sale once for all in execution of both decrees, yet having in fact been sold in execution of Thakur Dayal's decree and the sale confirmed, it was not competent to the Court executing the decree to confirm the second sale, as was shown by its inability to issue a certificate and deliver possession. The lower appellate Court reversed the decree on the ground that, when the appellant's objection to the confirmation of the second sale had been disallowed, he ought to have appealed, and that, having failed to appeal, the order confirming the sale became final under s. 257 of the Civil Procedure Code. The lower appellate Court also adverts to cases (1) in which it has been held that, when the right, title and interest of a judgment-debtor in a particular property is sold, there is no warranty that he has any right, title or interest, and therefore that he cannot

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(1) These cases were *Rajib Lochan v. Bimalamini Dasi*, 2 B. L. R., A. C. 82; and *Sowdamini Chowdrain v. Krishna Kishor Poddar*, 4 B. L. R., F. B., 11; 12 W. R., F. B., 8.

recover his purchase-money if it turn out that the judgment-debtor had no interest in the property.

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It appears to us that there is a circumstance in the present case which distinguishes it from the cases in which the rule referred to by the Judge was laid down. In these cases the Court advertised for sale whatever interest the judgment-debtor had in the property, and although it did not guarantee that he had any interest in the property, it sold and confirmed to the purchaser whatever interest there was to sell. In the case before the Court the interest advertised for sale had immediately before the sale to the appellant been already sold by the order of the Court executing the decrees in execution of the decree of Takhur Dayal, and when that sale was confirmed the subsequent sale was practically disallowed and nullified. The Court had advertised for sale the interest of the judgment-debtor as it existed before the sale made in execution of Thakur Dayal's decree. When the sale had been declared absolute, the Court could not confirm to the purchaser at the second sale the interest it had advertised for sale, and although in terms it passed an order confirming the second sale, it in fact did not confirm the second sale, as the Court of first instance observes, for it found it impossible to carry out its order by the issue of a certificate and delivery of possession to the purchaser at the second sale, seeing it had already confirmed the sale of the same interest, and transferred the property to the purchaser at the first sale. The rule of *caveat emptor* does not apply, for the interest offered for sale was the interest advertised, and if the first sale had been disallowed, that interest would have passed to the purchaser at the second sale, but when the first sale was confirmed the second sale could not be carried out, for the interest advertised had been already sold.

The question remains whether the appellant is precluded from maintaining this suit because he failed to appeal from the orders confirming the sales. The lower appellate Court finds there was no irregularity in the conduct of the sales, inasmuch as the officer conducting the sale simply carried out the orders he had received, and it appears to us the lower Court has properly arrived at this conclusion. It is no doubt true that the officer conducting the sale

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might have put up the property to sale once for all in execution of both decrees, and have left the Court executing the decrees to determine the rights of the respective decree-holders to the purchase-money realised by the sale, but we cannot go so far as to say he was bound to put up the property once for all for sale in execution of the decrees. There being separate orders for sale, the decree-holders might have called upon him to execute them separately, each desiring to dispute the right of the other. There was certainly no irregularity in the conduct of the sale in execution of the decree of Thakur Dayal ; and if that sale had been set aside for any irregularity or otherwise, it does not appear that any irregularity would have been proved to vitiate the sale in execution of the decree of Gaya Prasad and Ram Manorath, and this being so the purchaser at the second sale could not have maintained an objection to either sale on any of the grounds mentioned in s. 256 of Act VIII of 1895. His objection was in fact of a different nature. His objection to the sale in execution of Thakur Dayal's decree having been overruled, he resisted the order confirming the second sale on the ground that the Court was incompetent to confirm a sale which had by its previous order been nullified. The provisions of s. 257 apply to applications made under s. 256 and to those only, and consequently the appellant is not in our judgment precluded by the terms of that section from maintaining this suit. We therefore reverse the decree of the lower appellate Court, and restore that of the Court of first instance with costs.

*Appeal allowed.*

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*Before Mr. Justice Turner and Mr. Justice Oldfield.*

**BHICHUK SINGH AND OTHERS (JUDGMENT-DEBTORS) v. NAGESHAR NATH AND OTHERS (DECREE-HOLDERS).\***

*Special Appeal—Suit of the nature cognizable in a Small Cause Court—Act XXIII of 1861, s. 27—Act XLIII of 1860, s. 1.*

*Held*, where a suit of the nature cognizable in a Court of Small Causes was instituted before Act XLIII of 1860 came into force, and an order was made on regular appeal in execution of the decree in such suit after the passing of Act XXIII of 1861, that the provisions of s. 27 of Act XXIII of 1861 applied, and accordingly no special appeal would lie from such order (1).

\* Application, No. 4 of 1878, for a review of the judgment in Appeal from orders, No. 13 of 1878, dated the 25th June 1878.

(1) See also *Gora Chand Misser v. Raja Baykanto Narain Singh*, 12 B. L. R., 261.

THE facts of this case were as follows: On the 22nd December 1876 the holders of a decree for money dated the 9th May 1843 which had been made in a suit of the nature cognizable in Courts of Small Causes, applied for the execution of such decree. On the 13th April 1877 the Court of first instance refused this application, on the ground that the execution of the decree was barred by limitation. On the 24th December 1877 the order of the Court of first instance was affirmed by the lower appellate Court on appeal by the decree-holders. On the 25th June 1878 the decree-holders having appealed to the High Court from the order of the lower appellate Court, the High Court (TURNER, J., and OLDFIELD, J.) set aside the orders of the lower Courts, and remanded the case to the Court of first instance for proper orders.

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The judgment-debtors now applied to the High Court for a review of its judgment dated the 25th June 1878 on the ground that no second appeal would lie to it from the order of the lower appellate Court, such order having been made in a suit of the nature cognizable in Courts of Small Causes.

*Lala Lalla Prasad*, for the judgment-debtors, respondents.

The *Senior Government Pleader* (*Lala Juala Prasad*), for the decree-holders, appellants.

The High Court (TURNER, J., and OLDFIELD, J.) delivered the following judgments:

TURNER, J.—I cannot say that, if the point raised in this case had come before the Court in the absence of authority, I should not have been disposed to hold that the language of s. 27 of Act XXIII of 1861 prohibited a special appeal in suits of the nature triable by Courts of Small Causes instituted prior to the passing of Act XLIII of 1860. It appears to me that, on a strict construction of the terms of s. 1 of that Act and of the analogous provisions of s. 27 of Act XXIII of 1861, it would be held that the language of the Acts was prospective and applied to suits which should be thereafter instituted rather than to suits which had been already instituted and determined (1). But seeing that it has been ruled by

(1) So held in *Bholanath Dutt v. Mokadeb Shest*, 3 W. R. Mis. 19.

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a Full Bench of the High Court of Calcutta (1) that the terms on which the appellant relies are merely words of description and do not relate to the time of institution, for such I take it is the effect of the decision, and seeing also that the cases must be few in which the point can arise, for all doubt is removed by the language of the amended Code, I do not consider myself justified in unsettling the law as it has been settled by that decision, and consequently agree that this Court had not jurisdiction to hear the appeal, that the review of judgment must be allowed, and the appeal dismissed, but as the point was not taken at the hearing of the appeal, I would order that each party should bear his own costs in this Court.

OLDFIELD, J.—The decree which was in execution in this case is dated 9th May 1843. The first Court disallowed execution on the ground that it was barred by limitation. On regular appeal the Judge affirmed that order. A special appeal was admitted by this Court, and we reversed the orders of the Courts below. It is now pleaded, by way of review of judgment, that there was no special appeal with reference to the provisions of s. 27 of Act XXIII of 1861. There is no doubt that the suit out of which the execution proceedings arose is a suit of the nature cognizable in Courts of Small Causes, and that there will be no special appeal if the law of s. 27 of Act XXIII of 1861 is applicable to this case, but it is urged that it does not apply since the suit was instituted before the passing of the Act.

In my opinion the Act does apply, since the order in regular appeal was passed after Act XXIII of 1861 was enacted, and the terms of s. 27 are explicit, that “no special appeal shall lie from any decision or order which shall be passed on regular appeal after the passing of this Act in any suit of the nature cognizable in Courts of Small Causes.” The order being passed after the Act was passed there is no question of giving retrospective effect to the Act. Nor can I think, as suggested, that the words in the concluding part of the section “when the debt, damage, or demand for which the original suit *shall be* instituted” were meant to imply that the Act only operates on decrees or orders made in suits to be insti-

(1) See *Soorjo Coomar Surma Roy v. Krishto Coomar Chowdhry*,  
12 B. L. R., 224; 14 W. R. F. B., 30.

tuted after the Act came into force. I cannot understand why the Legislature should have so intended, for though a suit may have been instituted before the Act was passed no right of special appeal would accrue, so the Act cannot be said to operate unjustly in taking away by retrospective action and right of appeal already accrued, when it is made to apply to decrees or orders passed after it came into force. The provisions of the new Civil Procedure Code may not be applicable for deciding this case, but it may be noticed that the provisions of s. 586 of Act X of 1877 admit of no doubt on the point, and they were presumably intended to re-enact the old law on the point, and the view I take is in accordance with a Full Bench of the Calcutta Court (1).

On the above view of the law, I am of opinion that this Court had no jurisdiction to hear the appeal, and I allow the review of judgment and dismiss the appeal. Each party should pay his own costs in this Court.

*Appeal dismissed.*

*Before Mr. Justice Turner and Mr. Justice Oldfield.*

BHAGIRATH (DEFENDANT) v. NAUBAT SINGH (PLAINTIFF).\*

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January 30.

*Mortgage—Contribution.*

*M*, *B*, and *N* held mauza *D* in equal one-third shares, and *M* also held a share in mauza *A*. On the 3rd January 1863 *M* and *B* mortgaged their shares in mauza *D* to *L* to secure a loan of certain moneys. On the 16th March 1870 *M*, *B*, and *N* mortgaged mauza *D* to *R* to secure a loan of Rs. 600, and on the same day, by a separate deed, they mortgaged mauza *D*, and *M* mortgaged his share in mauza *A*, to *R*, to secure a loan of Rs. 1,600. On the 8th December 1875 *L* obtained a decree for the sale of the shares of *M* and *B* in mauza *D* for the satisfaction of the mortgage-debt due to her. On the 18th April 1876 *R* obtained a decree for the realisation of the mortgage-debts due to him by the sale of mauza *D* and *M*'s share in mauza *A*. On the 23rd October 1876 the shares of *M* and *B* in mauza *D* were sold in the execution of *L*'s decree, and were purchased by *R*. A portion of the purchase-money was applied to satisfy *L*'s decree, and the balance of it was deposited in Court. Instead of applying to the Court to pay him this balance in execution of his decree dated the 18th April 1876, *R* attached and obtained payment of such balance in execution of a decree for money which he held against *M* and *B*. On the 20th June 1877 *R*, in

(1) 12 B. L. R., 224 ; 14 W. R. F. B., 30.

\*Second Appeal, No. 836 of 1878, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 13th June 1878; reversing a decree of Maulvi Muhammad Sami-ul-la Khan, Subordinate Judge of Moradabad, dated the 6th March 1878.

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execution of his decree dated the 18th April 1876, brought to sale *N's* one-third share in mauza *D*, and became its purchaser. On the 20th July 1876 *E*, in execution of a decree for money against *M*, brought to sale his share in mauza *A*, and became its purchaser. *Held*, in a suit by *N* against *E* in which he claimed that the sum due by him under the two mortgages dated the 16th March 1870 and the decree dated the 18th April 1876 might be ascertained, and that, on payment of the amount so ascertained, the sale of his one-third share in mauza *D* might be set aside, and such share declared redeemed, that the sale of *N's* share in mauza *D* could not be set aside.

*Held* also that, if it were shown that the sum realised by the sale of his one-third share in mauza *D* exceeded the proportionate share of his liability on the two mortgages, he was entitled to recover one moiety of such excess as a contribution from mauza *A*.

As it appeared that there was such an excess the Court gave *N* a decree for a moiety of such excess together with interest on the same from the date of the sale of *N's* share at the rate of twelve per cent. per mensem, and further directed that, if such moiety together with interest were not paid within a certain fixed period, *N* would be at liberty to recover it by the sale of the share in mauza *A*, or so much thereof as might be necessary to satisfy the debt.

THIS was a suit in which the plaintiff claimed a declaration of the amount due by him under certain mortgages, and the decree enforcing those mortgages, and that, on payment of the amount so declared, the sale of his interest in the mortgaged property might be set aside and such interest declared redeemed. The Court of first instance dismissed the suit. The lower appellate Court, on appeal by the plaintiff, gave him a decree, against which the defendant preferred the present appeal to the High Court. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Bishambar Nuth*, Mir *Zahur Husain*, and Munshi *Hanumon Prasad*, for the appellant.

Munshis *Kashi Prasad* and *Sukh Ram*, for the respondent.

The High Court (TURNER, J., and OLDFIELD, J.) delivered the following

JUDGMENT.—Mahtab Singh, Balwant Singh, and Naubat Singh, the respondent, held mauza Darni in equal one-third shares and Mahtab Singh also held a  $2\frac{1}{2}$  biswa share in mauza Atwa. On the 3rd January 1863 Mahtab Singh and Balwant Singh hypothecated their share in mauza Darni to secure a loan advanced by Ladli Begam. On the 16th March 1870 Mahtab Singh, Balwant Singh, and

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Naubat Singh hypothecated mauza Darni to the appellant to secure a loan of Rs. 600, and by another deed executed on the same date the same persons hypothecated mauza Darni, and Mahtab Singh his  $2\frac{1}{2}$  biswa share in mauza Atwa, to the appellant to secure a loan of Rs. 1,600. On the 8th December 1875 Ladli Begam obtained a decree for the sale of the shares of Mahtab Singh and Balwant Singh in mauza Darni for the satisfaction of the mortgage debt to her. These shares were accordingly sold on the 23rd October 1876 and purchased by the appellant for Rs. 7,000. Of this sum Rs. 5,954-12-0 were applied to satisfy the decree held by Ladli Begam and the balance Rs. 1,322-4-0, after deducting Rs. 18 commission on the sale, were deposited in Court. On the 18th April 1876 the appellant obtained a decree for the realisation of the mortgage-debts due to him by sale of mauza Darni and the  $2\frac{1}{2}$  biswa share in mauza Atwa. In execution of this decree he might and it may be should have applied to the Court to pay to him the surplus remaining in Court after the satisfaction of the decree of Ladli Begam, but instead of so doing he attached and obtained payment of the sum of Rs. 1,322-4-0 in execution of a money-decree which he held against Mahtab Singh and Balwant Singh. On the 20th June 1877 the appellant in execution of his decree of the 18th April 1876 brought to sale the one-third share of Naubat Singh in mauza Darni and became the purchaser of that share for the sum of Rs. 2,600, the amount due under the decree being Rs. 5,004. On the 20th July 1877 the appellant in execution of a money-decree against Mahtab Singh brought to sale the  $2\frac{1}{2}$  biswa share belonging to Mahtab Singh in mauza Atwa, and although the property was knocked down to one Daya Ram was himself registered as the purchaser.

The respondent Naubat Singh filed the suit now before the Court in appeal, praying that the sum due by him under the mortgages of the 16th March 1870 and the decree of the 18th April 1876 may be ascertained, and that on payment of the amount so ascertained the sale of his one-third share in mauza Darni may be set aside and the share declared redeemed.

The Subordinate Judge held that on the facts above stated the sale could not be set aside and dismissed the suit. The District



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Judge has reversed the decree of the Court of first instance, and decreed that on payment of the respondent's share of the decree of the 18th April 1876, which by the way is not ascertained in the judgment, nor in the decree, the sale of the respondent's one-third share in Darni shall be set aside and the mortgage-debt redeemed.

We are compelled to hold that the sale of the one-third share of Naubat Singh cannot be set aside. If the respondent could have shown that there were grounds on which the sale should not have taken place, he should have resisted the order for sale, but in fact there were no grounds. He could not have shown that there was nothing due from him on the mortgages to which he was a party jointly with Mahtab Singh and Balwant Singh without any specification of their several liabilities. He might perhaps have called upon the Court executing the decree to have declared the amount outstanding on the decree reduced by the sum of Rs. 1,322-4-0, and had he brought into Court the amount found due the Court would have set aside the order for sale. The respondent would in that case also have been at liberty to make the owner of the  $2\frac{1}{2}$  biswa share of Atwa contribute to the payment of any sum paid by him in excess of his own share of the mortgage-debt for which that property was pledged together with mauza Darni.

The respondent's one-third share of Darni was, however, sold and realised Rs. 2,600, and if it be shown that the proportionate share of the appellant's liability on the two mortgages does not amount to so much, he is entitled to recover one moiety of the excess paid on account of the mortgage for Rs. 1,600 as a contribution from mauza Atwa. It appears that the debts of Rs. 600 and Rs. 1,600 respectively amounted, with interest, &c., at the time the decree was executed, to Rs. 5,961-10-5. The debt of Rs. 600 was then swollen to Rs. 1,625-14-5 $\frac{1}{2}$ , and the debt of Rs. 1,600 to Rs. 4,335-11-11 $\frac{1}{2}$ . The respondent's one-third share of the liability of Rs. 1,625-14-5 $\frac{1}{2}$  amounted to Rs. 541-15-5 $\frac{2}{3}$ ; the shares of his co-debtors to Rs. 1,083-14-11 $\frac{1}{3}$ . The respondent's share of the liability for Rs. 4,335-11-11 $\frac{1}{2}$  amounted to Rs. 1,445-3-11 $\frac{2}{3}$ . After applying the Rs. 2,600 realised by the sale of the respondent's share to the discharge of these liabilities, it will be seen that a balance of Rs. 2,058-0-6 $\frac{2}{3}$  remains, after discharging

Rs. 541-15-5 $\frac{1}{2}$ ; his liability under the mortgage for Rs. 600; and after discharging from this balance Rs. 1,445-3-11 $\frac{3}{8}$ , his liability under the mortgage for Rs. 1,600, a surplus of Rs. 612-12-6 $\frac{3}{8}$ ; he has a right to claim contribution from mauza Atwa to the extent of one moiety of this amount, *viz.*, Rs. 306-6-3 $\frac{1}{2}$ . Although then we must reverse the decree of the Court below setting aside the sale, the respondent is entitled to a declaration that Rs. 306-6-3 $\frac{1}{2}$  are due as a contribution from mauza Atwa, and to interest on that sum from the date of sale at the rate of 12 per cent. per annum; and in order to avoid future litigation we consider it not improper to order in this suit that, in the event of that sum with interest to the date of payment not being paid within three months from the date of decree, the respondent shall be at liberty to recover it by the sale of the 2 $\frac{1}{2}$  biswa share in Atwa or so much thereof as may be necessary to satisfy the debt. We order that the respondent bear his own costs and pay two-thirds of the costs of the appellant in all Courts, the costs so awarded are to be set off against so much of the amount declared due to the respondent under the decree.

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*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*

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January 31.

GOSHAIN GIRDHARIJI (DEFENDANT) v. DURGA DEVI (PLAINTIFF).\*

*Arbitration—Act XVIII of 1873 (N.-W. P. Rent Act)—Act XIX of 1873 (N.-W. P. Land Revenue Act).*

Under the general law parties to suits may, if they are so minded, before issue joined, refer the matters in dispute between them to arbitration, and after issue joined, with the leave of the Court.

Act XVIII of 1873 does not prohibit the parties to the suits mentioned therein from referring the matters in dispute between in such suits to arbitration.

Where therefore the parties to a suit under that Act agreed to refer the matters in dispute between them to arbitration, after issues had been framed and evidence recorded, and applied to the Court to sanction such reference, *held* (STUART, C.J., dissenting) that the Court was competent to grant such sanction, and on receiving the award to act on it.

THIS was an appeal to the High Court heard by a Division Bench composed of Stuart, C.J., and Spankie, J., which was referred

\* Second Appeal, No. 595 of 1878, from a decree of H. G. Keene, Esq., Judge of Agra, dated the 8th March 1878, affirming a decree of Pandit Debi Prasad, Assistant Collector of Muttra, dated the 23rd November 1877.

1879 by Stuart, C.J., to the other Judges of the Court, under s. 575 of  
 GOSHAIN Act X of 1877, the Judges composing the Division Bench differing  
 GIEDHARIJI on a point of law. The facts of the case are sufficiently stated for  
 v. the purposes of this report in the judgment of the Judges composing  
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 whom the appeal was referred.

Mr. *Leach* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Nand Lal*, for the respondent.

The judgments of the Judges of the Division Bench were as follows :

SPANKIE, J.—The Assistant Collector in this case referred a rent suit, under s. 93 of Act XVIII of 1873, to arbitration by consent of parties. He determined the suit and made his decree in accordance with the award. In appeal the Judge maintained the decree. It is contended in second appeal that, in the absence of any provision in the rent law permitting reference to arbitration, the Assistant Collector had no authority to act as he did act, and that his decree and the decision of the Judge supporting it are bad.

It is argued that s. 96 of the Rent Act expressly authorises reference to arbitration by consent of parties on *applications* made under s. 95 of the Act, but the law is silent as regards arbitration in suits. This is so, and I feel the weight of the argument.

It might perhaps be answered that Revenue Courts, as defined in s. 3 of Act XIX of 1873, published simultaneously with Act XVIII, have general authority under s. 220 of Act XIX of 1873 (which amends and consolidates the law as to land revenue and the jurisdiction of revenue officers), with consent of parties, to refer any dispute before them to arbitration. But the Revenue officers who can do so are the Commissioner of a Division, the Collector of a District, an Assistant Collector of the first class, and an Officer in charge of a Settlement, or an Assistant Settlement Officer.

Now Assistant Collectors of the *second* class can try certain suits under Act XVIII of 1873, but they are not included in s. 220 of Act XIX of 1873. To this objection it might be said that, when the Assistant Collector of the second class tries suits under s.

93 of Act XVIII of 1873, within the limits of s. 98, he is practically exercising the full powers of an Assistant Collector of the first class. This, however, would not be a very satisfactory solution of the objection. It is, I think, more probable that the framers of Act XVIII of 1873 either accidentally omitted to provide for reference to arbitration in suits, or overlooked altogether the necessity of doing so. At the same time it might be urged, as indeed the lower appellate Court urges, that it is difficult to "believe that it was in the intention of the Legislature, in enacting s. 96 of Act XVIII of 1873, to deprive parties of an wholesome privilege which they enjoyed before : rather it should seem their intention was to strengthen and extend the privilege by applying to applications a power which before only applied to suits." Be this as it may, I would rest my judgment in this case on the circumstance that, though there is no provision in the Act for a reference to arbitration, there is no prohibition of it. It appears to be the rule that, with few exceptions, if any, now all suits may as a matter of right be referred to arbitration by consent of parties, and it would be intolerable perhaps if litigants were not allowed full liberty to adjust their differences in the mode which, after the case has been taken into Court, might be found most convenient and most likely to lead to a friendly and final settlement of disputes.

This is not a case in which it was sought to divest the ordinary jurisdiction of the Revenue Court. There was no agreement to keep out of Court. The reference to arbitration sprung out of the introduction of the case into Court.

The suit was instituted on the 1st June 1877 : defendant filed a written statement in reply on the 9th July : witnesses were examined on behalf of both parties on the 6th and 16th August : and reference to the arbitrator was made on the 27th August : and after hearing objections against the award, it was made the basis of the decree by the first Court. Under s. 144 of the Act, the Court may, from time to time, in order to the production of further evidence, or for other sufficient reason to be recorded by the Court, adjourn the hearing of any case to such day as to it may seem fit. In some degree this reference to arbitration was adjournment of the case for "sufficient reason," that is to say, to meet the written

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wishes of both parties and to settle the dispute. But the judgment of the Court (s. 151) is in accordance with the provision of the section. With this view of the case, I cannot say, in the absence of any prohibition in the Act to the submission of the record in its final stage to a referee on the motion and by consent of parties, that the suit was not heard and determined in the manner provided by the Act, which is all that is obligatory, assuming that there was no illegality, the decision being in accordance with the award.

I would not allow the appeal on the objection taken, but would affirm the judgment of the lower appellate Court.

STUART, C.J.—This is a second appeal to this Court from the judgment of the Judge of Agra, in appeal to him from a decree of the Assistant Collector of Muttra.

The suit was originally instituted in the Court of the Assistant Collector of Muttra, for the recovery of Rs. 484-8-0, principal and interest, on account of arrears of rent for the rabi crop for 1281 fasli ; and in the course of the procedure before that officer the parties filed a consent to refer the matter in dispute to arbitration, upon which the Assistant Collector made an order referring the suit to arbitration accordingly, and an award was made in the plaintiff's favour by an arbitrator, with some alleged irregularities on his part which, however, need not here be referred to, as they are immaterial to the appeal now before us. The Assistant Collector upheld the award and made a decree in conformity with it, and from this decree an appeal was taken to the Judge, in which it was contended, among other things, that there was no provision in the Rent Act, XVIII of 1873, authorising such an arbitration as had taken place in this case, and that the whole proceedings therefore in the disposal of the suit were irregular. This plea the Judge disallowed, and the defendant has now preferred a second appeal to this Court on the same plea, and it is the only reason of appeal before us.

I am of opinion that the Judge is wrong, that the plea is well founded, and that therefore the present appeal must be allowed. In his judgment the Judge appears to me to misapprehend the case before him when he says that it is "a question as to whether an

award willingly resorted to by the parties ought to be set aside ;” and he goes on to observe that the present Rent Law, “as is notorious, is very defective in regard to procedure, having been entirely carried through the Legislature by officials who had no judicial experience.” Now the material question as regards the arbitration was not whether it was willingly resorted to, but whether, willingly or not, it was a valid and competent proceeding in itself; and as to the Rent Act, it may have its defects, but I do not think it deserving of the sweeping censure passed upon it by the Judge ; and in regard to the question in this appeal respecting the arbitration that was ordered and took place, the Act appears to me to be very clear indeed. In my opinion this question must be determined solely with reference to the express provisions of the Rent Act. By s. 93, which is the commencement of “Ch. v, Jurisdiction of Courts,” it is provided that “except in the way of appeal as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suits shall be heard and determined in the said Courts of Revenue in the manner provided in this Act, and not otherwise :” and the very first class of suits mentioned as falling under this absolute and exclusive provision are suits for arrears of rent on account of land, which is the nature of the suit in the present case, and there is not a word in this section about referring suits to arbitration, whether with or without the consent of the parties. Nor is this the less remarkable from the fact that a subsequent s. 96 provides for the reference to arbitration of “applications” as these are enumerated in s. 95. S. 96 provides that all applications under s. 95 “shall be made, &c., and may, with the consent of the parties, be referred to arbitration under sections 220 to 231, both inclusive, of the North-Western Provinces Land Revenue Act, 1873.” There is here not a word about the reference to arbitration of the suits mentioned in s. 93, which on the contrary provides that such suits “shall be heard and *determined* in the manner provided by the Act, and *not otherwise*.” Of course there is nothing to prevent parties to such suits themselves of their own private consent referring them to arbitration, and agreeing that the award under such a private arbitration shall be binding

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on themselves. But so far as arbitrations of such suits before or by the order and authority of the Revenue Courts are concerned, there is no procedure for, because there is no law authorising, them. On the contrary, s. 93 may fairly in this respect be argued to be prohibitory by force of the absolute and exclusive language of its sanction, the suits mentioned in it being, as I have already pointed out, enacted to be heard and determined in the manner provided and not otherwise. To say the least indeed, this section 93 is abundantly pregnant with a meaning sufficient to exclude references of such suits as the present to arbitration before the Court, and it appears to me plainly to show such an intention. But, on the other hand, such suits are not in the least inconsistent with express provisions for a reference to arbitration, if this had been intended and incorporated with the other provisions of Act XVIII of 1873. We must, however, take that Act as we find it, and a careful examination of it has satisfied me that, giving even the widest meaning to its terms, there can, under s. 93 or any other part of it, be no reference to arbitration before the Court in such a suit as the present.

But it was suggested at the hearing that, although the Rent Act does not provide for the arbitration of such suits, it does not expressly prohibit them, and that it is legitimate to argue in their favour from the provisions as to arbitrations in the contemporaneous Revenue Act, XIX of 1873. By s. 220 of that Act it is provided that a Commissioner of a Division and other Revenue officers mentioned "may, with the consent of the parties, by order, refer any dispute before him to arbitration, and that certain other Revenue officers may, by order, refer any dispute before him to arbitration without the consent of the parties." And the subsequent sections of the Revenue Act, from ss. 221 to 231 inclusive, contain anxious provisions for the regulation of and procedure to be observed in such arbitrations and for the enforcement of awards made in them. Now there can be no doubt that, if such an attempt to supply the supposed defects of the Rent Act, by importing into it the anxious arbitration provisions of the Revenue Act, could be entertained, such an arbitration as was ordered in the present case was a reasonable and valid proceeding, as of course on the same grounds *all* the suits mentioned in s. 93 of the Rent Act could

be referred to arbitration, its exclusive and prohibitory language notwithstanding. But the fair argument is to my mind of a very different and indeed totally opposite nature. For it appears to me that the very fact of these arbitration provisions in the Revenue Act having been left out in the Rent Act, which was passed on the same day, may not only be fairly contended to show, but must be judicially considered by us as showing, that it was not in the mind and intention of the Legislature to allow them, and that the necessary force of the exclusive language of the Rent Act, without the use of any express prohibition on the subject, has this effect.

I must not omit to notice another argument that was used at the hearing against the validity of arbitrations before the Court of suits of the kind described in s. 93 of the Rent Act, XVIII of 1873. That argument was derived from the previous Rent Act, XIV of 1862, and to my mind it has considerable cogency. By s. 14 of the latter Act it is enacted that "the provisions of ch. vi. (relative to arbitration) of the Code of Civil Procedure shall apply to suits under the said Act X of 1859 (the previous Rent Act) and under this Act." So that, until the present Rent Act was passed, there was full provision for a reference to arbitration in such a suit as the present, but there is no corresponding provision in the present Act, and the very fact that it has been left out in the present Rent Act may I consider be allowed to lend no little force to the contention that the express provision of the present Act must be understood as limited in this respect.

Such is the conclusion to which I find myself driven by the language of the present Rent Act, XVIII of 1873. The question before us is not one respecting any principle of rent law, or as to who are or who are not Revenue officers in such a case, but whether Revenue Courts in administering s. 93 of that Rent Act, be the officers who they may, have power to refer the suits therein mentioned to arbitration. To this question there can be but one answer. Most clearly these Courts have no such power, and the order of reference made in the present case, with the recorded consent of the parties, was altogether *ultra vires* of the officer who made it.

At the same time it is difficult to understand why such should be the law, for there appears to be no reason in equity or policy

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why such suits as are mentioned in s. 93 of Act XVIII of 1873 should not be referred to arbitration, in the same way that "applications" under s. 96 of the same Act and "disputes" as provided by the contemporaneous Revenue Act XIX of 1873 may be. However, it is not our duty to speculate about these considerations, but to accept and apply this written law as we find it. If the intention of the Legislature was not of the nature which I have, in the way of argument, given it credit for, and there has been an accidental omission in the present Rent Act, this can be supplied by the same legislative authority which passed it; but, however that may be, we, as a Court of justice, bound to interpret and apply the law according to recognised principles of legal construction, can only look for the legislative intention to the letter of the Act itself, and behind or beyond its own terms we cannot go; and that being so, I think it must be conceded that the reasoning I have applied to the present case must be given effect to, and that our judgment should be for the appellant.

I would therefore allow this appeal, setting aside the arbitration proceedings complained of, the award therein, and the orders of both the lower Courts, and I would remand the case for re-trial on the merits under s. 562 of Act X of 1877. The costs of this remand to be costs in the suit, and to abide the result of the re-trial.

The judgment of the Judges to whom the appeal was referred (PEARSON, J. TURNER, J., and OLDFIELD, J.) was delivered by

TURNER, J.—The appellant instituted in the Revenue Court a suit for rent against the respondent. The respondent denied liability to the appellant and questioned the amount. The cause came for trial before Pandit Debi Prasad, an Assistant Collector of the first grade. After evidence had been taken the parties agreed to refer the matters in dispute to the arbitration of a single arbitrator whom they named. Having executed an agreement to this effect they presented a petition to the Assistant Collector, informing him of the agreement at which they had arrived and praying that the record might be sent to the arbitrator. The agreement was produced in the Revenue Court, and thereupon the Assistant Collector assented to the proposed arbitration and sent the record

to the arbitrator, requesting him to submit his award in a week. The arbitrator ordered the parties to attend on a day named, and when no one appeared for the appellant at the time fixed for the meeting, the arbitrator first recorded a proceeding declining to enter upon the arbitration, but having received a letter from the appellant stating he would attend at 4 P.M., and that the evidence on his part was on the record, the arbitrator withdrew his refusal and proceeded to determine the matters referred to him without any objection being taken on the part of the appellant. A few days after the day named by the Court, the arbitrator submitted an award in favour of the respondent. The appellant objected that the arbitrator having once declined to act had no power to proceed with the reference without a fresh agreement executed by the parties, and that the award could not be accepted inasmuch as it was not submitted within the time appointed by the Court. The Assistant Collector overruled both these objections and passed a decree in favour of the respondent on the basis of the award.

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The appellant appealed to the District Court respecting the objections he had taken to the award, and urging a new objection that the Rent Act XVIII of 1873 contained no provision for the reference of suits to arbitration, and that the Revenue Court was not otherwise empowered to make the reference. The Judge, pointing out that the parties had willingly resorted to arbitration, considered that the Procedure Code Act VIII of 1859, which was in force when the suit was tried, should be equitably followed in the silence of the Rent Law; that the Legislature could not have intended to deprive parties of a wholesome privilege which they had enjoyed before the Rent Law of 1873 was passed, but that it was rather the intention to extend the privilege by applying it to applications as well as to suits; the Judge also held that the Assistant Collector had rightly overruled the objections taken by the appellant in the Revenue Court, no misconduct having been proved on the part of the arbitrator.

The appellant then appealed to the High Court on the ground that, in the absence of a provision in the Rent Act, the Assistant Collector was not competent to refer the case to arbitration, and that no decree could legally pass against him on the award. The

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appeal came for hearing before a Bench composed of His Honor the Chief Justice and Mr. Justice Spankie. (After referring to the judgments of STUART, C.J., and SPANKIE, J., and stating the grounds on which the judgments of these Judges respectively proceeded, the judgment continued :) There is no doubt force in the reasoning of the learned Chief Justice. It is remarkable that, whereas the Legislature had previously to the passing of the Rent Act of 1873 facilitated the reference of matters in dispute to arbitration by the application of the provisions of the Procedure Code to rent suits, and whereas both in respect of applications under the Rent Act of 1873 and in respect of any dispute under the Revenue Act of the same year, special provision had been introduced to facilitate such reference, no similar provision was made in the Rent Act of 1873 regarding the suits triable under s. 93. But unless we are constrained to hold that the words "shall be heard and determined in the manner provided in this Act and not otherwise" necessitate the decision of every suit to which the provision refers after trial by the Court, we are unable to regard the arguments to which we have adverted conclusive. As we understand the general law, parties to suits may, if they are so minded, before issue joined, refer the matter in dispute to arbitration, and after issue joined with the leave of the Court. The special provisions introduced into the Procedure Code and the Land Revenue Act of 1873 did not create this right, but facilitated its exercise and provided for the summary adjudication of questions which might arise respecting the reference and award. Parties to suits and proceedings to which these special provisions have not been applied are not in the absence of special prohibition deprived of the liberty to submit their disputes to arbitration, but they cannot take advantage of the facilities afforded by these provisions, and questions arising out of the reference and on the award cannot be determined summarily.

It is admitted that, unless we are to find it in the terms of s. 93, there is no other provision in the Rent Act which prohibits parties to the suits mentioned in that section from referring the matters in dispute to arbitration. Do then the terms of s. 93, on which His Honor the Chief Justice has laid stress, necessarily impart such a prohibition? We consider that when read with the context they do not constrain us to this conclusion. The object of

the whole clause was to confine the cognizance of the matters therein mentioned to Courts of Revenue, and to prohibit other Courts from taking cognizance of them, and it was declared that such suits as were mentioned in the section should be heard and determined by the Courts of Revenue in the manner provided in the Act and not otherwise, in order the more emphatically to assert the sole jurisdiction of the Courts of Revenue in such matters, and not with a view to deprive the Courts of Revenue of any ordinary power possessed by Courts of Justice, nor the parties of any liberty or privilege which are ordinarily enjoyed by parties to suits.

In the case before the Court, the parties of their own motion consented to a reference, and issues having been joined properly applied to the Court for its sanction. The Revenue Court was in our judgment competent to accord sanction, and on receiving the award to act on it. The appeal should then in our judgment be dismissed, and with costs.

*Appeal dismissed.*

*Before Mr. Justice Turner and Mr. Justice Oldfield.*

BINDA PRASAD (PLAINTIFF) v. MADHO PRASAD AND OTHERS  
(DEFENDANTS).\*

1879  
January 31.

*Act VIII of 1859 (Civil Procedure Code), s. 194.—Decree payable by Instalments—Act X of 1877 (Civil Procedure Code), s. 210.*

*Quære.*—Whether “a decree for the payment of money” means merely what is commonly known as a money-decree, or includes a decree in which a sale is ordered of immoveable property in pursuance of a contract specifically affecting such property, within the meaning of s. 194 of Act VIII of 1859 and s. 210 of Act X of 1877.

Where a Court, on the ground that the defendant was “hard pressed,” directed the amount of a decree to be paid by instalments extending over ten years and allowed only one half of the usual rate of interest, *held* that there was no “sufficient reason” for directing payment of the amount of the decree by instalments, and that such Court had exercised its discretion injuriously to the plaintiff by the length of the period over which the instalments were extended, and by allowing a rate of interest less than the ordinary rate.

THIS was a suit on a bond for the payment of money which charged certain immoveable property with such payment. This bond was dated the 6th January 1874, and the obligors, defendants

\* First Appeal, No. 61 of 1878, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 4th February 1875.

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in this suit, agreed therein to pay the principal sum, Rs. 4,800, together with interest at 12 per cent. per annum, by the end of December 1874. The suit was instituted on the 27th September 1877, the plaintiff claiming Rs. 6,945-5-6, principal and interest, calculating the interest from the 6th January 1874 to the 27th September 1877 at 12 per cent. per annum. The defendants admitting the execution of the bond, contended in their written statement that the plaintiff was not entitled to interest after the end of December 1874, and prayed that the amount of the decree which the Court might make might be paid by instalments of Rs. 700 per annum, without interest. The Court of first instance held that the plaintiff was entitled to the interest claimed by him ; and, observing that the plaintiff was willing to take a decree directing that the amount claimed by him should be paid by the defendants by three annual instalments, but that the defendants desired annual instalments of Rs. 700, continued as follows: "I, considering them (defendants) to be hard pressed, hold it to be not unfair to the plaintiff if instalments be fixed at the rate of Rs. 800 per annum, accompanied with the stipulation for payment of interest at eight annas per cent. per mensem on each instalment : the plaintiff's suit with costs and future interest at eight annas per cent. per mensem is therefore thus decreed against the defendants and the property hypothecated : the whole sum claimed and the costs of the suit are payable by instalments at the rate of Rs. 800 per annum, the first instalment being payable by the end of the year from this date, and interest at the said rate should be paid on each instalment from this date : if any instalment with interest on it be not paid by the due date, the plaintiff will have the right to realise at once all the unpaid and unexpired instalments, together with interest at the said rate from this date until liquidation, from the hypothecated property in the first instance, and if any balance remain due, the same from the other properties of the defendants as well as their persons."

The plaintiff appealed to the High Court against this decree, contending that the Court of first instance was not competent to direct payment of the amount by instalments, and that, even if competent to do so, it had improperly exercised its discretion in so doing.

Pandits *Bishambhar Nath* and *Ajudhia Nath*, for the appellant.

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Babus *Oprokash Chandar*, *Ram Das*, and *Beni Prasad*, for the respondents.

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The following judgments were delivered by the High Court :

TURNER, J.—The appellant, being the holder of a mortgage for Rs. 4,800 and interest, brought this suit to recover the debt by the sale of the mortgaged property, and also by the ordinary process of execution against the person and property other than that mortgaged of the debtor. The term of the mortgage had expired, and the defendant made no defence save that interest was not payable after the expiry of the term, but he prayed the Court would order the payment of the debt by instalments of Rs. 700 per annum, and without interest. The Court below held that, even if the terms of the mortgage deed did not distinctly provide for the payment of interest after the expiry of the term, the plaintiff was entitled to recover interest as damages, and to this finding no objection has been taken on appeal, but it has also considered that, inasmuch as the defendant was hard pressed, it might fairly award that the debt should be payable by instalments of Rs. 800, and should bear interest at the rate of 6 per cent. The plaintiff has contended in appeal that the decree varies the contract specifically affecting the security, and that the Court was incompetent to direct payment of the mortgage debt by instalments, that if it had the power to do so it has not properly exercised its discretion in so doing, in that there were no sufficient reasons for ordering payment by instalments, that the instalments ordered defer the complete payment of the debt for a longer period than is equitable, *viz.*, ten years, and that on deferring the satisfaction of the debt for so long a period the Court ought to have allowed the usual rate of interest, *viz.*, 12 per cent. per annum.

The Code recognises the distinction which is well known in our Courts between money-decrees and decrees for the recovery of a debt by the sale of property mortgaged for its satisfaction. I may refer to the provisions of ss. 322 and 323, and I therefore incline to the opinion that the provisions of s. 210 were intended to apply to what are commonly known as money-decrees, and not to decrees

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in which a sale is ordered of immoveable property in pursuance of a contract specifically affecting the property.

There are some instances in which debts are contracted without any specific agreement as to the time of payment, and when it is shown that dealings have been conducted on this footing and no injury is done to the creditor by ordering payment by instalments, the Court may be well intrusted with a discretion to arrange the payment of a debt by instalments, but when a contract is distinctly made for payment on a date certain for the purpose of enabling the creditor to obtain punctual payment, the circumstance that the payment is secured by an hypothecation of property ought not to deprive him of that right. We have, moreover, to interpret the law without examining its policy, and it would, in my judgment, probably be held that the provisions of s. 210 apply, as in terms they appear to apply, only to decrees for the payment of money.

In the case before the Court the plaintiff sought not only a money-decree but a decree for the sale of the property in pursuance of the contract by which it was specifically affected, and therefore, if the construction I incline to put on the terms of s. 210 be right, in the absence of consent on the part of the plaintiff the Court had no power to vary the contract and direct payment by instalments, but if it had that power, I am of the same mind with my honorable colleague, that there was no sufficient reason for its exercise in this case, and that it has exercised it injuriously to the plaintiff by the length of the period over which the instalments are extended, and by allowing a rate of interest less than the ordinary market rate on mortgages of land when the payment is so long deferred. On this ground I also concur in the result of the judgment of my honorable colleague.

The proceeding to which the Subordinate Judge adverts as containing a consent on the part of the appellant to take payment by instalments has been considered. The appellant's pleader no doubt stated his client was willing to take payment by instalments spread over three years, but his offer was not accepted, and he was therefore at liberty to insist on the payment of the debt forthwith. I concur then in the decree proposed by my honorable colleague.

OLDFIELD, J.—The plaintiff sued for the recovery of a sum of money with interest secured by the mortgage of immoveable property. The lower Court found in favor of the plaintiff as to the amount due, but made a decree to the effect that the whole sum and the costs of the suit should be paid by instalments of Rs. 800, the first instalment being payable by the end of the year, and interest at the rate of 6 per cent. per annum should be paid on each instalment from date of decree, and if any instalment with interest on it be not paid by the due date, the plaintiff will have the right to realise at once the amount due from the hypothecated property in the first instance, and then from other properties of the defendants as well as their persons.

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The question in the appeal preferred by the plaintiff is whether the order directing the payment by instalments can be set aside, and an order made for enforcement of the hypothecation by sale of the property in the event of the immediate non-payment of the debt.

The lower Court's order has been made under s. 194 of Act VIII of 1859, and a question has been raised whether that section is applicable to decrees for the payment of money by sale of immoveable property. I should hesitate to hold that the section contemplates a distinction of the kind suggested, and I incline to think that, whether the decree decrees the payment of money simply, or proceeds to direct its realisation by sale of particular property mortgaged as security in event of non-payment, it is still a "decree for the payment of money" in the words of the section, when the Court may order the amount to be paid by instalments. There seems no reason why a simple debt should, when decreed, be payable at the discretion of the Court by instalments, and not a debt secured by the mortgage of immoveable property. On the contrary when there is such security there is all the less risk to the creditor from delay in payment incident to payment by instalments.

But it is only on sufficient reason being shown that a Court can exercise the power allowed, and no sufficient ground is disclosed here. All that the Subordinate Judge says on the point is that the defendants are hard pressed, and he holds it not unfair that the instalments should be paid at the rate of Rs. 800 per annum. The reason



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assigned amounts to nothing more than an inability to pay, but that is no sufficient reason why execution should not at once proceed. It is denied that the plaintiffs were willing to allow the defendants to pay the debt by instalments, but at any rate any offer made was not accepted, and there is no reason why the claim should not be decreed. The decree should be modified and the claim decreed, with costs and interest at 6 per cent. from date of the institution of the suit, by sale of the property hypothecated, and this appeal decreed with costs.

1879  
January 23.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

SARASUTI (DEFENDANT) v. MANNU (PLAINTIFF).\*

*Declaratory Decree—Hindu Law—Inheritance—Sudra—Illegitimate Son.*

In a suit merely for a declaration of right in respect of certain property, the lower appellate Court, considering that the suit was really one for the possession of such property, allowed the plaintiff to make up the full amount of court-fees required for a suit for possession. The plaint in the suit was not amended, and the lower appellate Court eventually gave the plaintiff a declaratory decree. *Held*, on second appeal by the defendant, who objected that a suit merely for a declaratory decree could not be maintained, that such objection ought not to be allowed under the circumstances.

The illegitimate offspring of a kept woman or continuous concubine amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra. Under the Mitakshara law the son of a female slave by a Sudra takes the whole of his father's estate, if there be no sons by a wedded wife, or daughters by such a wife, or sons of such daughters. If there be any such heirs the son of a female slave will participate to the extent of half a share only. *Held* therefore that *M*, the illegitimate son of an *ahir* by a continuous concubine of the same caste, took his father's estate in preference to the daughter of a legitimate son of his father who died in the father's lifetime.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Lala Lalla Prasad, for the appellant.

Mr. Conlan and Babu Barodha Prasad, for the respondent.

\* Second Appeal, No. 933 of 1878, from a decree of W. Young, Esq., Officiating Judge of Mainpuri, dated the 29th June 1878, reversing a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 22nd February 1877.

The judgment of the High Court was delivered by

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OLDFIELD, J.—The plaintiff, who is an *ahir*, brought this suit for a declaration of his right as heir to all the property left by his father, Baldeo Prasad. The Court of first instance found the plaintiff to be an illegitimate son of Baldeo Prasad, and therefore not entitled to inherit. The appeal came before the Judge, Mr. Tyrrell, and, on an objection as to the insufficiency of the stamp, he permitted the plaintiff to make up the full amount of fees required for a suit for possession of the property, which the Judge considered was the real object of the suit. He also found plaintiff to be the illegitimate son of Baldeo Prasad by a woman of the *ahir* class, and he remanded the suit for a finding as to the custom prevailing in respect to the right of inheritance of such a son. The appeal was finally disposed of by Mr. Young, before whom the finding on the issue remitted came, which was to the effect that the issue of a concubine of the same caste inherits property equally with the children of the lawful wife. Mr. Young has held on the precepts of Hindu law, and without allowing distinctions with reference to the kind or degree of illegitimacy that the illegitimate offspring of a Sudra by a woman of the same caste will have a right of inheritance in default of legitimate male issue, and he has given a decree declaring the plaintiff to have established his right in the property in suit.

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The first plea in appeal takes the objection that a suit for a declaration of right cannot be maintained. We consider the plea cannot now be allowed under the circumstances. There is no doubt that the claim is one for a declaration of a right only, and that the plaint has never been amended, and the decree passed is only for a declaration of a right, but the plaintiff has paid full institution fees, and we are not disposed to throw out the suit at this stage.

The next plea is to the effect that it is only the son born of a female slave as distinct from a concubine who can inherit the property of a Sudra. We consider that the plaintiff's right of inheritance is one which should be determined by Hindu law, and the law of succession applicable is stated in *Mitakshara*, ch. i, s. xii, vv. 1 and 2, and is to the effect that the son begotten on a

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female slave takes the whole estate if there be no sons of a wedded wife or daughters of such a wife or sons of daughters ; but if there be any of the above-named heirs the son of a female slave will participate for half a share only,—*Rahi v. Govind* (1) ; *Chuturga Runmurdu Syn v. Sahib Purhlad Syn* (2), and *Inderan Valungpuly Taver v. Ramaswamy Pandia Talavar* (3) may be referred to for authority that illegitimate sons of Sudras inherit as heirs ; and there is authority for holding that there is no such distinction as is contended for between a son born of a slave and of a concubine. The question will be found very fully discussed in the decision of the Bombay High Court above cited, which held that the illegitimate offspring of a kept woman or continuous concubine (and that is what the plaintiff before us is found to be) amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra, and this view accords with the opinion expressed in a decision of the Madras High Court (4), and is in accordance with Strange's Hindu Law, 4th ed., p. 69 ; West and Bühler, 2nd ed., p. 110 ; and Colebrooke's Dayabhaga, ch. ix, vv. 29, 30, 31, and Digest, Bk. v, ch. iii, v. clxxiv. It is opposed to a decision of the Calcutta High Court (5) and to a note to be found in Macnaughten's Hindu Law, vol. ii, p. 15. The former is a case decided by the law of the Bengal school, and the decision proceeds very much on rejecting the hitherto accepted translation by Colebrooke of passages in the Dayabhaga, and the opinion expressed in Macnaughten's Hindu Law does not seem to accord with what was held in a case reported at p. 256 of the same volume.

The plaintiff is heir in preference to the defendant, who is the daughter of a legitimate son of Baldeo Prasad, who died in his father's lifetime, and it is not urged that there are any nearer heirs living. The other pleas in appeal have no weight. We dismiss the appeal with costs (6).

*Appeal dismissed.*

- (1) I. L. R., 1 Bom., 97.
- (2) 7 Moore's Ind. App., 18.
- (3) 3 B. L. R., P. C., 1.
- (4) *Pandaiya Telaver v. Puli Telaver*, 1 Mad. H. C. R., 478.
- (5) *Narain Dhara v. Rahhal Gain*, I. L. R., 1 Calc., 1.

- (6) The plaintiff in this case was presumably not the offspring of an incestuous or adulterous intercourse. Such offspring it has been held cannot inherit—see *Dalti Parisi Nayudu v. Dalti Bangaru Nayudu*, 4 Mad. H. C. R., 204.

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

**KALIAN DAS (PLAINTIFF) v. TIKA RAM AND ANOTHER (DEFENDANTS).\***

1879  
February 3.

*Act XVIII of 1873 (N.-W. P. Rent Act), s. 95, (m) and (n)—Jurisdiction—Civil Court—Revenue Court.*

*T*, the occupancy-tenant of certain lands, gave *K* a lease of his occupancy-rights for a term of twenty years. In the execution of a decree for the ejectment of *T* from such lands obtained by the landholder against *T* in a suit to which *K* was no party, *K* was ejected from such lands. This decree was subsequently set aside, and *T* recovered the occupancy of such lands. *Held*, in a suit by *K* against *T* and the landholder, in which *K* claimed the occupancy of the lands and mesne profits for the period during his dispossession, in virtue of the lease, that the suit was one cognizable in the Civil Courts and not one on the subject-matter of which an application of the nature mentioned in s. 95 of Act XVIII of 1873 could have been made, so as to give the Courts of Revenue exclusive jurisdiction in such matter.

THE facts of this case were as follow : Balkishen and Seva Ram were the tenants with a right of occupancy of certain lands. Gobind Ram, the karinda of Thakur Das, the zamindar of these lands, sued in his own name Balkishen and Seva Ram in the Revenue Court for arrears of rent and to eject them, and eventually obtained a decree on the 25th August 1871. On the 26th August 1871 Balkishen and Sheva Ram gave Kalian Das a lease of their occupancy rights in the lands for a term of twenty years. On the 25th July 1872 the decree dated the 25th August 1871 was in effect set aside by the appellate Court on the ground that the Revenue Court of first instance had no jurisdiction. Notwithstanding this execution of that decree was taken out by Gobind Ram, and on the 18th April 1873 Kalian Das, who had obtained possession of the lands as lessee of Balkishen and Seva Ram, was dispossessed. Subsequently the appellate Court granted a review of the judgment dated the 25th July 1872, and on the 1st July 1874 it dismissed Gobind Ram's suit on the ground that Gobind Ram could not sue in his own name. The decision of the appellate Court dated the 1st July 1874 was affirmed by the High Court on special appeal. While the special appeal was pending Balkishen and Sava Ram both died, and Thakur Das also died. On the deaths of these persons

\* Second Appeal, No. 878 of 1878, from a decree of G. L. Lang, Esq., Officiating Judge of Aligarh, dated the 11th June 1878, reversing a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 22nd December 1877.

1879 Tika Ram, the heir of Balkishen and Seva Ram, and Ganga Kuar,  
 KALIAN DAS the widow of Thakur Das, entered into an agreement with each  
 v. other, under which Tika Ram recovered the occupancy of the lands.  
 TIKÁ RAM. In August 1877 Kalian Das brought the present suit in the Civil  
 Court against Tika Ram and Ganga Kuar, claiming a declaration  
 of this right to, and possession of, the lands in virtue of the lease, and  
 also certain mesne profits. The Court of first instance gave him a  
 decree, holding that the suit was cognizable in the Civil Courts.  
 On appeal by the defendant Tika Ram, the lower appellate Court  
 dismissed the suit, referring the plaintiff to the Revenue Courts, on  
 the ground that the subject-matter of the suit was one on which  
 applications of the nature mentioned in (m) and (n), s. 95 of Act  
 XVIII of 1873, might be made, and of which, therefore, no  
 Courts other than Courts of Revenue could take cognizance under  
 the provisions of that section.

The plaintiff appealed to the High Court contending that the  
 suit was cognizable in the Civil Courts.

*Babu Jogindra Nath Chaudhri*, for the appellant.

*Munshi Hanuman Prasad* and *Lala Lalta Prasad*, for the  
 respondents.

The judgment of the Court was delivered by

SPANKIE, J.—The plaintiff, appellant, is a sub-tenant, claiming  
 under a lease for a term of twenty years. The occupancy-tenant,  
 defendant, under whom he holds was ejected in execution of a de-  
 cree held by the zamindar, also impleaded in this suit. Though  
 plaintiff, appellant, was no party to the suit in which a decree had  
 been made against the occupancy-tenant, he nevertheless lost his  
 possession when the decree was executed. Subsequently the decree  
 of which execution was taken out was set aside, and the defendant,  
 the occupancy-tenant, resumed possession of his holding, but  
 refused to give it up to the plaintiff, his sub-tenant. The  
 suit is one which, in our opinion, is cognizable by the Civil  
 Court, and the claim not one regarding which application could  
 have been preferred to the Collector under s. 95 of the Rent Act.  
 We are fortified in this opinion by a precedent of this Court (1)

(1) S. A., No. 1115 of 1877, not reported.

dated 1st March 1878. We decree the appeal, reverse the judgment of the lower appellate Court, and return the case to that Court for retrial on the merits. Costs will abide the result of a new trial.

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*Cause remanded.*

## CRIMINAL JURISDICTION.

*Before Mr. Justice Pearson.*

February 5  
of 1880.

EMPRESS OF INDIA v. RAM ADHIN AND OTHERS.

*Act XLV of 1860 (Penal Code), ss. 71, 146, 147, 319, 323—Offence made up of several offences—Rioting—Hurt.*

Rioting and causing hurt in the course of such rioting are distinct offences and each offence is separately punishable.

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioners, eight in number, in pursuance of a common object, assaulted another party composed of seven persons. In the affray which ensued members of both parties were injured. The petitioners were separately charged with, convicted of, and punished for offences under ss. 147 and 323 of the Indian Penal Code by Mr. E. White, Joint Magistrate of Allahabad, on the 4th November 1878; and these convictions and sentences were affirmed by Mr. H. Lushington, Sessions Judge of Allahabad, on the 16th December 1878.

Mr. Colvin, for the petitioners, contended that they could not be punished both for the offence of rioting and for that of voluntarily causing grievous hurt.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown.

PEARSON, J.—It is contended that both sentences under ss. 147 and 323 of the Indian Penal Code cannot stand. In support of the contention reference is made to the case of *Queen v. Rabiulla* (1) disposed of by Norman and Seton-Karr, JJ., on 16th January 1867. In that case the prisoners had been convicted under ss.

(1) 7 W. R., Cr. 18.

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147 and 304, and it was held that a separate charge for the former offence was not sustainable, and that the fact of his having been present as a member of the unlawful assembly should have been treated as part of the evidence of the major offence. Reference is also made to Mr. Justice Oldfield's ruling in the case of *Quern v. Mangroo* (1). The prisoner had been convicted of an attempt to kidnap and of wrongful confinement; and it was held that the two convictions could not be upheld. The case is postponed for a week to enable the learned counsel for the petitioners to search for more precedents in point.

The following judgment was delivered by the Court at the adjourned hearing of the case:

PEARSON, J.—To-day it is brought to my notice that the learned Judges Norman and Seton-Karr in the case of the *Queen v. Kallachand* (2), disposed of by them on the 29th April 1867, held rioting armed with deadly weapons to be a distinct offence from stabbing a person on whose premises the riot took place, and each to be separately punishable. It appears that in the case of *Queen v. Hargobind* (3), decided by this Court on the 7th July 1871, Mr. Justice Turner held that persons found guilty of rioting may, if the circumstances warrant it, be convicted of the several offences of rioting armed with deadly weapons, culpable homicide, and grievous hurt. The learned Judge referred to the case of *Rabi-ulla* mentioned above, and expressed his dissent from the ruling therein, and observed that a different view of the law had heretofore obtained in this Court. It further appears that the learned Judges of the Calcutta Court who disposed of *Rabi-ulla's* case ruled in a different direction in the case disposed of by them in the following month of April. On the whole the precedents which have been produced are opposed to the contention in this case. It is obvious to remark that rioting and unlawful assembly are offences against the public tranquillity, while assault, hurt, &c., are offences affecting the human body. Seeing no sufficient reason for interference, I reject this application.

*Application rejected.*

- (1) H. C. R., N.-W. P., 1874, p. 293.      (2) 7 W. R., Cr. 60.  
 (3) H. C. R., N.-W. P., 1871, p. 174.

## APPELLATE CIVIL.

1879  
February 7.*Before Mr. Justice Pearson and Mr. Justice Spankie.***BHIKHAM DAS (PLAINTIFF) v. PURA AND ANOTHER (DEFENDANTS).\****Hindu Law—Family dwelling-house—Ancestral property—Mortgage—Sale  
in Execution of decree.*

L, a Hindu, mortgaged the dwelling-house of his family, such dwelling-house being ancestral property. *Held*, in a suit against L's mother and wife to enforce the mortgage, brought after L's decease, that the mortgage could be enforced. *Mangala Debi v. Dinanath Bose* (1) and *Gauri v. Chandramani* (2) distinguished.

THIS was a suit against the widow and the wife of one Lachmi Narain, deceased, for certain moneys charged by the deceased on, amongst other properties, the dwelling-house of the family, such dwelling-house being ancestral property. The defendants set up as a defence to the suit that they had no other place to reside in except the family dwelling-house, and that they possessed a right of residence therein, and Lachmi Narain was therefore not competent to mortgage the same. The Court of first instance refused to give the plaintiff a decree for the sale of the dwelling-house on the ground that the defendants possessed a right of residence therein, and Lachmi Narain was consequently not entitled to mortgage it. In support of this ruling the Court referred to *Mangla Debi v. Dinanath Bose* (1) and *Gauri v. Chandramani* (2). On appeal by the plaintiff to the lower appellate Court, that Court agreed in the views of the Court of first instance.

The plaintiff preferred a second appeal to the High Court, contending that Lachmi Narain was competent to mortgage the house and the mortgage was enforceable.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram* for the appellant.

Pandit *Bishambar Nath*, for the respondents.

The judgment of the Court was delivered by

PEARSON, J.—The decisions to which the lower Courts have referred do not rule that an ancestral house cannot be sold in exe-

\* Second Appeal, No. 968 of 1878, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 20th May 1878, affirming a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 14th February 1878.

(1) 4 B. L. R. O. J., 72; S. C., 12 W. R. O. J., 35.

(2) I. L. R., 1 All., 262.



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cution of a decree, if the judgment-debtor's widow be residing in it. They relate to the question, not at present raised in this case, as to whether the widow could be ousted by the auction-purchaser. In the present case the house was hypothecated before the rights of the respondents arising out of the demise of Lachmi Narain had accrued. We accept and decree the appeal with costs, and in modification of the decree of the lower Courts decree that portion of the claim which was dismissed by them.

*Appeal allowed.*

1879  
February 10.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

SAHAJ PANDEY AND OTHERS (DEFENDANTS) v. SHAM NARAIN AND ANOTHER (PLAINTIFFS).\*

*Mortgage—First and second mortgages—Assignment by mortgagee—Rights of assignees.*

In March 1866 the proprietors of a certain share in a certain village mortgaged the share to *R*, giving him possession of the share, and stipulating that the mortgagee should take the profits of the share in lieu of interest, and that the mortgage should be redeemed on payment of the principal sum without interest. In April 1866 *R* mortgaged his rights and interests under the mortgage of March 1866 to *S*, retaining possession of the share. In February 1869 the proprietors of the share again mortgaged it to *R* for a further loan. Under this mortgage *R* was entitled to take the profits of the share in lieu of interest, and the mortgage was redeemable on payment both of the principal sum due thereunder and of that due under the mortgage of March 1866 without interest, or the mortgagors were entitled to redeem a certain portion of the share on payment of a proportionate amount of such sums, without interest, on a particular day in any year. In August 1872 *S* obtained a decree on the mortgage of April 1866, directing the sale of *R*'s rights and interests under the mortgage of March 1866 in satisfaction of such decree. In May 1874 *R* assigned by sale to *N* his rights and interests under the mortgage of February 1869 retaining possession of the share. In April 1877 *R*'s rights and interests under the mortgage of March 1866 were sold in execution of the decree of August 1872, and were purchased by *S*, who obtained possession of the share. *Held*, in a suit by *N* against *S* to obtain possession of the share in virtue of the assignment of May 1874, that, under the circumstances of the case, *S* was entitled as against *N* to the possession of the share as first mortgagee.

THE facts of this case were as follows: In March 1866 Gaya Prasad and Shimbu Prasad, the owners of a four-anna share in a certain village mortgaged the share to one Ramzan for

\* Second Appeal, No. 948 of 1878, from a decree of C. Daniell, Esq., Officiating Judge of Gorakhpur, dated the 18th July 1878, affirming a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 7th May 1878.

Rs. 4,400, placing the mortgagee in possession. Under the terms of this mortgage the mortgagee was entitled to the profits of the share in lieu of interest, and the mortgagors were entitled to redemption on payment of the principal sum advanced without interest. On the 19th April 1865 Ramzan sub-mortgaged the share to Sahai Pandey and certain other persons for Rs. 2,351, retaining the share in his own possession. Under the terms of this mortgage the mortgage-money was to be repaid together with interest at nine per cent. per annum within one year. On the 5th February 1869 Gaya Prasad and Shimbu Prasad again mortgaged the share to Ramzan for a further advance of Rs. 1,600. Under the terms of this second mortgage the mortgagee was entitled to the profits of the share in lieu of interest, and the mortgagors were entitled to redeem the whole share on payment of the principal sums due under both mortgages without interest, or a certain portion of the share on the payment of a proportionate amount of such sums without interest on the 15th Jeth Sudi of any year. On the 1st August 1872 Sahai Pandey and his co-mortgagees obtained a decree against Ramzan on the mortgage dated the 19th April 1865, directing that his rights and interest under the mortgage of March 1875 should be sold in satisfaction of such decree. On the 16th May 1874 Ramzan assigned by sale to Sri Niwas and Sham Narain his rights and interests under the mortgage dated the 5th February 1869, he retaining possession of the share. In April 1877 the rights and interest of Ramzan under the mortgage of March 1865 were sold in the execution of the decree dated the 1st August 1872, and were purchased by Sahai Pandey and his co-mortgagees, the decree-holders, who obtained possession of the share. The present suit was brought by Sri Niwas and Sham Narain against Sahai Pandey and his co-mortgagees for the possession of the share in virtue of the assignment dated the 16th May 1874, and for certain mense profits. The Court of first instance gave the plaintiffs a decree for possession of sixteen sixtieths of the share as representing Ramzan's interests under the second mortgage, the remaining fifty-four sixtieths representing his interests under the first mortgage. On appeal by the defendants the lower appellate Court affirmed the decree of the Court of first instance.

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The defendants appealed to the High Court contending that they were entitled as first mortgagees to the possession of the entire share.

Mr. Conlan, Pandit *Adjudhia Prasad*, and *Lala Lalta Prasad*, for the appellants.

Pandit *Bishambar Nath* and Maulvi *Mehndi Hasan*, for the respondents.

The judgment of the Court was delivered by

OLDFIELD, J.—The facts found are these: The owner of the property in suit, a four-anna share in a certain mauza, mortgaged it to Ramzan in 1272 fasli for Rs. 4,400 and put the mortgagee in possession; a condition of the mortgage being that the mortgagee should enjoy the profits in lieu of interest, and the mortgage should be redeemed on payment of the principal. After this in the same year Ramzan sub-mortgaged the same four-anna share to the defendants (appellants) for Rs. 2,351, retaining possession of the share himself. Subsequently in 1276 fasli the owner of the property made a second mortgage of the same share to Ramzan for Rs. 1,600, on the same footing as to interest and enjoyment of rents as the first mortgage, the mortgage being redeemable on payment of the principal due on both mortgages, or a one-anna one-pie share of the estate being redeemable on payment of a proportionate amount of the debt. Ramzan in 1281 fasli sold his interest under this second mortgage to the plaintiffs for Rs. 1,800, but as has been found retained possession of the mortgaged share. The defendants in 1279 fasli (i.e. 1872 A.D.) sued Ramzan on the mortgage in their favour and obtained a decree for its enforcement, and in 1877, in execution thereof, sold Ramzan's interest, which they themselves bought, and were put in possession of the share. The plaintiffs now seek to dispossess them by virtue of the right under the second mortgage made to Ramzan which they purchased.

On the facts found it appears to us that the defendants by reason of their interest as sub-mortgagees of the whole four-anna share under the first mortgage made to Ramzan, and as purchasers under the decree they obtained against him of his interest under the first mortgage, are entitled to possession of the property as

mortgagees in preference to the plaintiffs, who have only obtained an assignment of the interest of Ramzan under the second mortgage made to him. We therefore reverse the decrees of the lower Courts, and decree the appeal and dismiss the suit with costs in all Courts.

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*Appeal allowed.*

### FULL BENCH.

*Before Mr. Justice Turner, Offg. Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.*

1879  
February 17.

**BHAGWANTI (DEFENDANT) v. RUDE MAN TIWARI (PLAINTIFF).\***  
*Act XVIII of 1873 (N.-W. P. Rent Act), s. 9—Tenant at a fixed rate—Ex-proprietary Tenant—Occupancy Tenant—Inheritance to Rights of Occupancy.*

*Held* that the proviso to the last clause of s. 9 of Act XVIII of 1873 refers only to the holdings of ex-proprietary tenants and occupancy tenants and not to tenants at fixed rates.

THIS was a suit for, amongst other things, the possession of certain land, being the holding of one Behsa, deceased, a tenant at a fixed rate. The plaintiff, who was the third cousin of the deceased husband of Behsa, claimed the holding by right of inheritance. The Court of first instance gave the plaintiff a decree. On appeal by the defendants they contended that the plaintiff, being a collateral relative of Behsa, and not having shared in the cultivation of her holding, was not entitled to inherit the holding, under the provisions of the proviso to s. 9 of Act XVIII of 1873. The lower appellate Court held that that proviso was applicable to tenants with a right of occupancy and not to tenants at fixed rates.

The defendants preferred an appeal to the High Court contending again that the plaintiff was not entitled to inherit with reference to the provisions of s. 9 of Act XVIII of 1873. The Court (PEARSON, J., and OLDFIELD, J.) referred to the Full Bench the question whether the proviso in the last clause of s. 9 of Act XVIII of 1873 refers only to the holdings of persons having rights of occupancy, or also to the holdings of tenants at fixed rates.

*Mr. Niblett*, for the appellant.

\* Second Appeal, No. 1435 of 1877, from a decree of H. A. Harrison, Esq., Officiating Judge of Mirzapur, dated the 18th September 1877, affirming a decree of Maulvi Ruh-ul-la, Officiating Munsif of Mirzapur, dated the 16th June 1877.

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Pandit *Ajudhia Nath*, for the respondent.

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The following judgments were delivered by the Full Bench :

TURNER, O. C. J.—The ninth section of the Rent Act XVIII of 1873 declares what powers of alienation and succession attach to the rights of occupancy described in the preceding sections. It deals first with tenants at fixed rates, and declares simply that their right is heritable and transferable. It then proceeds to declare that no other right of occupancy is transferable by grant, will, or otherwise, except to a particular class, namely, co-sharers in such right, and then declares, in respect of such last-mentioned right, that is to say a right of occupancy other than the right of a tenant at fixed rates, that if the person entitled to it dies it shall devolve as if it were land, subject to the proviso that no collateral relative of the deceased who did not then share in the cultivation of his holding shall be entitled to inherit under this section; that is to say, it limits the right of succession under this provision of the Act to the lineal descendants of the deceased occupier, and in default of them to such of the collaterals as at the time of the death of the deceased occupier shared in the cultivation of the holding. It has been urged that the words “under this section” indicate that the right of succession is limited as well in the case of tenants at fixed rates as in the case of other tenants with a right of occupancy, and that the proviso applies to all rights of succession declared in that section. It is not necessary to determine whether the words on which reliance is placed are mere surplusage, nor whether it would have been more correct to substitute for them the words “under the preceding clause,” nor whether, as has been suggested at the bar, they were introduced to show that the limitation of inheritance did not extend to right of succession derived from custom, but to rights of succession created by the section in favour of tenants with a right of occupancy other than tenants at fixed rate, for the language of the section is of itself sufficiently clear. The proviso is limited to such of the collateral relatives of “the deceased” as “then” shared in the cultivation of the holding. These terms clearly relate to the person and the time mentioned in the preceding clause, “When any person entitled to such last-mentioned right dies.” The section having first mentioned and dealt with the rights of a

tenant at fixed rates, the right last-mentioned is the right of occupancy other than a right at fixed rates. Moreover, the construction contended for would leave a tenant at fixed rates at liberty to transfer his estate in his lifetime to whomsoever he pleased, while it would place on the devolution of the right by inheritance an onerous restriction. The proviso is undoubtedly limited to the devolution by inheritance of those rights of occupancy dealt with in the preceding clause, and does not affect the succession to the rights of tenants at fixed rates.

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PEARSON, J.—In my opinion the proviso does not refer to the holdings of tenants at fixed rates. The words in the third clause of the section “last-mentioned rights” clearly refer to the right mentioned in the preceding section, which is the right of occupancy-tenants other than those who hold at fixed rates; and the clause declares how, when any person entitled to such last mentioned right dies, the right shall devolve; while the proviso immediately following that no collateral relative of *the* deceased who did not *then* share in the cultivation of his holding shall be entitled to inherit, clearly refers to the person entitled to the same *last-mentioned right* who has died, and to him alone. The use of the word “clause” instead of “section” would apparently have been more proper.

SPANKIE, J.—Under the first clause of s. 9 of the Rent Act the right of tenants at fixed rates is declared to be heritable and transferable. The words are “shall be” heritable and transferable. There is no limitation and proviso to this declaration. The clause deals with tenants having a right of occupancy defined in s. 6 of the Act as “tenants at fixed rates.” The next clause deals with other tenants having a right of occupancy, but *not* at fixed rates. It declares that no other right of occupancy shall be transferable by grant, will, or otherwise, except as between co-sharers in such right. The third clause declares that, when any person entitled to “such last-mentioned right dies, the right shall devolve as if it were land.” What is “the right last-mentioned,” not rights, be it observed? Clearly, that other right of occupancy that is held by tenants who are not “tenants at fixed rates.” The proviso therefore that no collateral relative of the deceased who did not share at the time of his death in the cultivation of his

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holding "shall be entitled to inherit under this section" applies only to those tenants having rights of occupancy but not at fixed rates. The words "under this section" are awkwardly expressed, but there can be little doubt, I think, that the proviso applies only to those tenants who are occupancy-tenants within the meaning of s. 8 of the Act, those persons alone possessing the "last-mentioned right" referred to in the third clause to which the proviso is attached. It is possible, perhaps probable, that the proviso was due to the somewhat uncertain wording of s. 6 of Act X of 1859, which acknowledges the right of occupancy of a ryot cultivating or holding land for twelve years. Then it is declared that the holding of "the father or other person from whom a ryot inherits" shall be deemed to be the "holding of the ryot within the meaning of this section." Under the Rent Act, XVIII of 1873, the right in such cases shall devolve as if it were land, with this proviso that "no collateral relative of the deceased who did not then share in the cultivation of this holding shall be entitled to inherit under this section." This view of the case seems to show that the liberty of tenants at fixed rates to deal with their right is absolutely without limit, and inheritance follows the usual course with regard to the devolution of property, according to the law which applies to the deceased tenant, whereas that law, whatever it may be, is so far controlled by s. 9 of the Rent Act that, in cases of rights of occupancy acquired under s. 8 of the Act, no collateral relative of the deceased who did not share in the cultivation of his holding shall be entitled to inherit.

OLDFIELD, J.—I concur in the view taken by Mr. Justice Spankie.

## CIVIL JURISDICTION.

1879  
February 21.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

KALI CHARAN RAI AND OTHERS (PLAINTIFFS) v. AJUDHIA RAI AND OTHERS (DEFENDANTS).\*

*Suit for the Cancellation of a Document—"Subject-matter in dispute"—Appeal—Jurisdiction—Act VI of 1871 (Bengal Civil Courts Act), s. 22.*

The plaintiffs sued for the cancellation of a bond for the payment of Rs. 6,000 together with interest thereon at the rate of four per cent. per

\* Application, No. 37B of 1878, for revision of an order of R. Wall, Esq., Officiating Judge of Gházipur, dated the 26th August 1878.

mensum, alleging that they had executed such bond under the impression that it was a bond for the payment of Rs. 3,000 together with interest thereon at the rate of one and a half per cent. per mensum, whereas the defendants had fraudulently caused them to execute the bond in suit. The plaintiffs paid into Court Rs. 3,000 together with interest at the rate of one and a half per cent. per mensum. *Held* that the value of the subject-matter in dispute was the difference between Rs. 3,000 and Rs. 6,000 or thereabouts, and therefore the appeal from the decree of the Court of first instance preferred to the District Judge was cognizable by him.

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THIS was a suit for the cancellation of a bond for Rs. 6,000, dated the 17th November 1877, in which it was stated that interest was payable on the principal sum at the rate of Rs. 4 per cent. per mensum. The plaintiffs, the obligors of the bond, sued alleging that, having borrowed Rs. 3,000 from the defendants, they had agreed to give them a bond for the payment of that sum together with interest at the rate of Re. 1-8-0 per cent. per mensum, and that they had executed the bond in suit under the impression that it was the bond they had agreed to give, and that they had subsequently discovered that the defendants had fraudulently caused them to execute a bond for the payment of Rs. 6,000 with interest at Rs. 4 per cent. per mensum. The plaintiffs paid Rs. 3,000 into Court together with interest at the rate of Re. 1-8-0 per cent. The Court of first instance gave the plaintiffs a decree. On appeal by the defendants to the District Judge the Judge held that the value of the subject-matter of the suit exceeded Rs. 5,000, and that consequently he had no appellate jurisdiction in the matter, but that the appeal lay to the High Court.

The defendants applied to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877, on the ground that the District Judge had refused to exercise the jurisdiction vested by law in him.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Munshi *Hanuman Prasad*, for the petitioners.

Pandit *Bishambhar Nath* and Lala *Lalta Prasad*, for the opposite parties.

The judgment of the High Court was delivered by

PEARSON, J.—The value of the subject-matter in dispute in this suit appears to us to be the difference between Rs. 3,000 and



1879      Rs. 6,000 or thereabouts. We are therefore of opinion that the  
 KALI      appeal preferred to the Zila Judge was cognizable by him, and we  
 CHARAN   accordingly allow this application with costs, set aside the lower  
 RAI      Court's order, and direct it to replace the appeal on its file and to  
 v.      dispose of it according to law.  
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 RAI.

*Application allowed.*

## FULL BENCH.

1879  
 February 24.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr.  
 Justice Turner, Mr. Justice Oldfield, and Mr. Justice Brodhurst.*

NEHALO (DEFENDANT) v. KISHEN LAL AND OTHERS (PLAINTIFFS).\*

*Hindu Law—Widow's Estate, Forfeiture of—Unchastity during Widowhood.*

*Held*, under the Mitakshara law, that a widow, who has once inherited the estate of her husband, is not liable to forfeit that estate by reason of her subsequent unchastity. The ruling of the majority of the Full Bench of the Calcutta High Court in *Kery Kolitany v. Monessram Kolita* (1) followed.

THE facts of this case were as follows: Nehalo, who had succeeded to the separate estate of her deceased husband, Ganga Bishan, made a gift of such estate to Umrao Singh, a minor, the grandson of Sheo Singh, her deceased husband's elder brother. Kishen Lal and certain other persons, claiming to be the next reversioners to the estate of Ganga Bishan, sued Nehalo and Umrao Singh to set aside this gift, and to obtain possession of the property, alleging that Nehalo had become unchaste after her husband's death, and had consequently forfeited his estate. Nehalo admitted that since her husband's death she had given birth to an illegitimate child, but contended that the suit was not maintainable, inasmuch as Umrao Singh was the adopted son of Ganga Bishan, having been adopted by her after her husband's death, with the permission of her husband, and he was consequently the heir to the estate of Ganga Bishan. The Court of first instance allowed this contention and dismissed the suit. On appeal by the plaintiffs the lower appellate Court reversed the decree of the Court of first instance, holding that

\* Special Appeal, No 1202 of 1873, from a decree of R. H. Smith, Esq., Subordinate Judge of Meerut, dated the 19th July 1873, reversing a decree of Munshi Ram Lal, Munsif of Ghaziabad, dated the 29th April 1873.

(1) 13 B. L. R., 1; 19 W. R., 367.

by reason of her unchastity Nehalo had forfeited her husband's estate, and that the adoption of Umrao Singh was invalid, as Nehalo had no authority from her husband to adopt a son. The lower appellate Court remand the suit to the Court of first instance to determine whether or not the suit was maintainable by the plaintiffs in the presence of other heirs of which there appeared to be several.

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The defendants appealed to the High Court contending that Nehalo had not forfeited her husband's estate by reason of her unchastity.

The Division Bench before which the appeal came for hearing (PEARSON, J., and TURNER, J.) having regard to *Kery Kohitany v. Moneeram Kohita* (1) referred to the Full Bench the question whether, under the Hindu law prevailing in these Provinces, a widow who has once inherited the estate of her deceased husband is or is not liable to forfeit that estate by reason of unchastity.

Babu *Jogindro Nath Chaudhri* and Pandit *Nand Lal*, for the appellants.

Munshi *Hanuman Prasad*, for the respondents.

The following judgments were delivered by the Full Bench :

STUART, C.J.—After repeated consideration of the arguments and authorities referred to in this case, I feel that I can add nothing to what is clearly laid down in the judgment of the Calcutta High Court. But in expressing this opinion I desire to confine myself to the principles and authorities of the Hindu law, for I can derive no useful analogy from any rule or principle of the law of England or from any other European system of jurisprudence.

PEARSON, J.—The question referred to the Full Bench has been exhaustively considered and discussed by the learned Judges of the Calcutta High Court. It seems unnecessary to repeat at length the arguments used by them on both sides of the question and impossible to add thereto. After full consideration, the conclusion to which I have come is that the question was rightly answered in the negative by the majority of those learned Judges, and that we

(1) 13 B. L. R., 1; 19 W. R., 367.

1879 should return the same answer to the Bench which has put the  
 NERALO question to us.

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 KISHEN LAL. The opposite conclusion is certainly not an unavoidable inference from the text of Catayana mainly relied on in support of it: "Let the sonless widow, preserving (unsullied) her husband's bed and residing with her venerable relative, eat or enjoy moderately" not so long, be it observed, as she remains chaste or resides with her protector but "until her death." The text is in its form and may well be in substance a mere injunction. It enjoins submission to the venerable relative, purity of life, and moderation in enjoyment, and presents a marked contrast to the text under the authority of which a virtuous widow succeeds to her husband's estate "Let the wife who is not unchaste take her husband's wealth." This text, though an injunction in form, is much more in substance. It speaks of chastity as a condition of succession. On the contrary, as regards the text first quoted, the Privy Council has ruled that a widow does not forfeit the estate which has devolved upon her from her husband merely because she ceases to reside with the venerable relative who represents her husband's family; or, in other words, that such residence is not a condition of her retaining that estate.

Then there is the text which says that a "woman who acts maliciously and is shameless and a destroyer of property and addicted to immorality is *unworthy* of wealth." This cannot, without violence, be construed to mean that she is to be deprived of property which has come into her possession.

Nor can the text which authorises the husband's brothers to withhold maintenance from his widow if she becomes unchaste be fairly so construed. The termination of a duty of giving food and clothing to a person is a very different thing from the commencement of a right to take away from that person property belonging to her.

The penalty of forfeiture for unchastity, if not warranted by the texts, can hardly rest firmly on other grounds. The argument that an unchaste widow can no longer perform acts beneficial to her husband's soul is met by the consideration that there is no

essential connection between such acts and the property, and that an appointment which has been made by reason of an existing capacity in the person appointed is not always avoided *ipso facto* by the subsequent loss of the particular capacity. The argument that she takes the estate or continues to hold it after her husband's death as half of her husband's body, and cannot be regarded as such, or as such retain it, after having become unchaste, is met by the consideration that, if the estate was still possessed by the husband after his death in the person of his widow, a son would not take it in preference to the widow. The argument that the estate does not vest in the widow because her rights in it are of a limited and qualified nature is not weighty; for a limited right may vest as well as a perfect one.

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TURNER, J.—Although at the hearing I was inclined to hold otherwise, and although I have been a party to one or more rulings to the contrary, further consideration has satisfied me that there is not sufficient authority for holding that a widow who has inherited her husband's separate estate will, under the law we are bound to administer, forfeit her estate. The only arguments which can be adduced in support of the contention that the estate having once vested is forfeited by unchastity appear to me to be the following, *viz.*, (i) that she takes the estate because she is able to confer spiritual benefits on the deceased superior to those which can be conferred by any other heir, and that forfeiting the capacity by unchastity she forfeits the wealth; (ii) that from the use of the present participle "*palayanti*" in the text of Menu, "a woman preserving her husband's bed, &c.," a condition "*dum casta fuerit*" is to be inferred; (iii) that inasmuch as the allotment made by a joint family to a widow in lieu of maintenance may be resumed if she becomes unchaste (Smṛiti Chandrika, ch. xi, s. 1, vv. 47 and 48), it may be inferred that a widow who has inherited the separate property of her husband would forfeit her estate by similar misconduct; and (iv) that on remarriage the estate is forfeited.

To these arguments I think a sufficient answer may be made. The text of Menu refers to the period at which the inheritance devolves and the succession is to be ascertained, and merely prescribes as a rule of inheritance that a chaste wife succeeds to the separate

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estate of her husband in default of male issue, and does not attach a condition to the estate taken by the widow ; and it is a strong argument in favour of this view that the commentators who are generally exhaustive in their comments on texts have omitted any mention of the condition.

Again, the allotment of property in lieu of maintenance is the voluntary act of the family, and differs in this material particular from an estate devolving by law on the widow without the consent of the family, and while the family may be at liberty to resume their free gift, it cannot be inferred from this rule that they have power to take from her the estate which vested in her by law ; and it is the more remarkable that, if they had such power, the author of *Smriti Chandrika* should not have adverted to it equally with the rule from which the argument is derived. Again, on remarriage the woman becomes a member of the family into which she remarries, but unchastity does not deprive her of membership in the family into which she married.

The argument that a widow inherits for the purpose of conferring benefits on her husband by the employment of his wealth for pious purposes, and that she consequently forfeits the estate when she is no longer able to perform the ceremonies which are incumbent on a widow, proceeds on an incomplete statement of the grounds for the widow's succession. This point was considered and determined by the Privy Council in *Katma Natchiar v. The Raja of Shivagunga* (1), and it was ruled that "it is on the principle of survivorship that the qualification of the widow's right established by the *Mitakshara*.....must be taken to depend (2)," and the text is cited : "Of him whose wife is not deceased half the body survives, how should another take the property while half the body of the owner lives ?"

The principle that the degree of benefit which may be conferred on the deceased by the employment of his wealth regulates the succession may be invoked in aid of the widow's right to succeed, but it is not the sole principle on which the right is founded, and as is

(1) 9 Moore's I. A., 539.

(2) At p. 611.

shown in the succession to a co-parcener's interest in an undivided estate it is subordinate to the principle of survivorship.

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This being so, it appears to me the text of the Mitakshara, ch. ii, s. 10, v. 6, and the Viramitrodaya cited in Mr. Justice West's work (1) are pertinent. In these texts it is declared that disqualification arising before partition deprives the disqualified of their shares, but that one already separated from his co-heirs is not by disqualification deprived of his allotment.

The same principle applies to the succession of the widow. Adultery, unrepented of and unatoned, prevents the estate from vesting in her. Should it have vested she does not lose it by subsequent immorality.

OLDFIELD, J.—The question referred has already been fully discussed by the High Court of Bengal in *Kery Kolitany v. Moneeram Kolita* (2). The contention that a Hindu widow who has once succeeded to her husband's estate forfeits it by reason of unchastity appears to rest on the ground that chastity is the absolute condition on which she holds the estate, and forfeiture the penalty, or that she holds the estate for certain purposes, the due fulfilment of which is dependent on her remaining chaste, and forfeiture follows as a penalty on the failure to perform them by reason of unchastity.

It is asserted that this rule of law is to be gathered from the texts which indicate the importance of chastity, the dependence of women, the limited nature of the interest held by them in the husband's estate, and on the fact that their right to the succession depends on their capacity to confer benefits on the soul of the husband; that the texts of the Hindu Law make the chastity of the widow the condition for taking and for retaining the estate, as well as for taking and retaining allowances for maintenance and *stridhan*, or a woman's particular property, all of which are alike forfeited by reason of unchastity. We have to consider this question with reference to the law prevailing in the Benares school.

It may be admitted that the widow succeeds her husband with reference to her capacity to perform certain religious rites, as in

(1) See p. 300.

(2) 18 B. L. R., 1; 19 W. R., 367.

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the Mitakshara, ch. ii, s. i, v. 5,—“In the first place the wife shares the estate. ‘Wife’ (patni) signifies a woman espoused in lawful wedlock; conformably with the etymology of the term as implying a connexion with religious rites,”—and other authorities to the same effect; but under the Mitakshara law she cannot be said to take the estate with the sole view to perform such rites or services for the benefit of the deceased: this may be gathered from Mitakshara, ch. ii, s. i, v. 14, and the following verses, where the author is pressing the argument in favour of a wife’s succession, and cites the contention made by his opponents, that the wealth of a regenerate man is designed for religious uses, and that a woman’s succession to such property is unfit because she is not competent to the performance of religious rites, which he proceeds to refute by showing, first, that she is competent to perform many religious duties, and then by showing that wealth is intended for other purposes besides religious uses, citing Menu and Yajnavalkya, and implying that a widow may make other and proper uses of the wealth, and does not hold it merely and entirely as a trustee for the soul of her husband, as some would contend. The argument is thus weakened which would infer that she forfeits the estate when no longer able to perform these religious services, but it may be also met by the fact that other heirs whose succession is also dependent on their capacity to perform certain services, do not admittedly forfeit the estate on failure to perform them, and that the same texts inculcate other duties, on the widow’s failure to perform which do not operate as forfeiture.

It is asserted, however, that there are texts of law which absolutely make it a condition for retaining the estate that the widow remain chaste; among these texts is that from Menu: “The widow of a childless man keeping unsullied her husband’s bed and persevering in religious observances shall present his funeral oblation and obtain his entire share (1).” This is the only text in the Mitakshara from which it can be inferred that the obligation of chastity is a continuing one after succession; there are other passages, but they refer to chastity as a condition prior to succession and for a claim to maintenance. Then there is the following text from Catayana: “Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the pro-

(1) See Mitakshara, ch. ii, s. i, v. 6.

perty until her death : after her let the heirs take it (1);" the purport of these passages has been very fully discussed by the learned Judges of the High Court of Bengal in *Kery Kolitany v. Monseeram Kolita* (2).

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It is noticeable and significant that these passages do not in express terms attach the penalty of forfeiture for unchastity; the first passage may, I think, refer to the succession of the widow in the first instance, and the second be in the nature of a precept inculcating chastity: and it has been urged, and I cannot but think with some force, that inasmuch as this passage contains two conditions, the last of which does not admittedly carry forfeiture for failure, there is no reason why the first should do so.

If, then, the forfeiture of the estate for subsequent unchastity is to rest on direct passages inculcating it, I think it fails to be established.

But it is admitted that an unchaste wife cannot succeed to the estate, and it is asserted that maintenance and *stridhan*, or her peculiar property, can be resumed by reason of unchastity, and there is some force in the argument that, if this be so, there may be an inference in favour of the resumption for the same cause of the separate estate inherited from the deceased husband; but I think it would be unsafe to deduce the law as to one state of circumstances, merely from its enactment in respect of another state. Silence on a particular point may very well have been intentional, and there are obvious reasons why this may be the case in respect of the question before us, where the estate taken is a separate estate, and the certain result of such a law as is contended for would be to give openings so constant and harassing inquiries, in the interest of persons with merely reversionary interests.

When we find also that even the disqualifications which operate as bar to succession to property, among which is the being outcaste, will not operate to divest property once it has vested (see *Viramitrodaya*), it is a fair question to ask why unchastity should so operate.

There are texts to show that maintenance and *stridhan* are resumable by reason of unchastity, and it is hence inferred that the

(1) See *Day-bhaga*, ch xi, s. i, v. 56.

(2) 13 B. L. R., 1; 19 W. R., 367.



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separate estate taken by a widow must be resumable. In the Mitakshara the following passage from Narada is quoted: "Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord: but if they behave otherwise the brethren may resume that allowance (1)," and there is another passage from Yajnavalkya: "And their childless wives, conducting themselves aright, must be supported, but such as are unchaste should be expelled, and so, indeed, should those who are perverse (2)." These are the only passages in Mitakshara from which resumption of maintenance may be inferred, and that authority is silent as to the resumption of *stridhan*; but it should be observed that these passages are not cited in the Mitakshara expressly in support of resumption but are brought forward as the arguments sometimes used by the author's opponents against the widow's right of succession, and in favour of her right to maintenance only, a proposition which the author then proceeds to refute; and the last cited passage is stated to refer to wives of disqualified persons. There is, however, authority for asserting that maintenance may be resumed, but be this as it may, there is no analogy between the case of a widow succeeding to the separate estate of her deceased husband and that of one taking maintenance as a charge on property in an undivided family. It is easy to understand why the allowance may be resumable in the last case, while the separate estate may remain not liable to be resumed.

As to the power to resume *stridhan*, there are some passages in the Viramitrodaya as follows: "If a husband have a second wife and do not show honor to his first wife he shall be compelled by force to restore her property though it may have been given to him out of kindness. If suitable food, raiment, and dwelling be withheld from a woman, she may exact her own property and take a share of the estate with the co-heirs;" and further on comes the text: "A wife who acts unkindly towards her husband, who is shameless, who destroys his effects, and who takes delight in being faithless to his bed, is unworthy of separate property: the separate property she may have received shall be taken from her;"

(1) See Mitakshara, ch. ii, s. i, v. 7.

(2) See Mitakshara, ch. ii, s. i, v. 16.

and if all the passages be read together the separate property referred to seems to be that which the husband was obliged by the previous texts to give to the wife if he neglected her, and may not refer to *stridhan* generally, and the passages clearly refer to a resumption by the husband and not by other persons subsequently to his death.

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It has not been urged before us that property inherited from a husband classes as *stridhan* under the law of the Benares school and is necessarily to be forfeited under these texts.

Then we have the opinion of Mr. Colebrooke adopted by Sir T. Strange: "An unchaste woman is excluded from the inheritance of her husband, but no misconduct other than incontinency operates disinherison, nor after the property has vested by inheritance does she forfeit it, unless for loss of caste unexpiated by penance or unredeemed by atonement" (1); and the opinion of Mr. Ellis, given at vol. 2, p. 273, that "the wife does not succeed unless she be chaste, this is a necessary condition," may refer to her succession in the first instance. The only authority distinctly opposed is Elberling, to the effect that the widow enjoys the property on two conditions,—that she may remain chaste and that she does not make waste.

The decided cases have been very fully discussed by the learned Judges of the High Court of Bengal. The first two (2) may possibly be construed to rule forfeiture, but it is open to doubt. The third (3) has reference to the forfeiture of allowance on account of maintenance, and goes on the ground that unchastity involves degradation, which prevents the widow having a right to the heritage. The case reported in the seventh volume of Selwyn's Reports (4) is one in respect of a widow's maintenance. The case of *Radamoney Raur* (5) is, however, expressly, in favour of the forfeiture, but against this there is the case of *Saummoney Dossee* (6) which rules that "though, by Hindu law, incontinence excludes a widow from succession to her husband's estate, yet if

(1) Strange, 4th ed., by Mayne, 136.

(2) See Macnaghten's Hindu Law, 3rd ed., vol. ii, pp. 19, 20, 21, Cases iii and iv.

(3) See Macnaghten's Hindu Law, 3rd ed., vol ii, p. 112, Case v.

(4) *Bussunt Koomaree v. Kummul Koomaree*.

(5) 4 Montriou's H. L. Ca. 314.

(6) 2 T. & B., 300.

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the inheritance were once vested it is not liable to be divested unless her subsequent incontinence were accompanied by degradation, but that by Act XXI of 1850 deprivation of caste could no longer be recognised as working a forfeiture of any right or property or affecting any right of inheritance."

In the case reported in the fourth volume of the Bombay High Court Reports, p. 25 (1), it was ruled that incontinence excludes a widow from succession to her husband's estate, but nothing short of actual infidelity; if, however, the inheritance becomes vested in the widow it is not by Hindu law liable to be divested, unless her subsequent incontinence be accompanied by loss of caste unexpiated by penance and unredeemed by atonement. Of cases decided by this Court, the only ones which have been pointed out are those noted (2).

The first was a case in which a Hindu widow held a share of ancestral property in an undivided estate for her maintenance. She deserted her husband's family and lived with a paramour. The Pandit consulted by the Judge was of opinion that she forfeited the share by reason of unchastity, but was still entitled to maintenance. The Sudder Court decided that the share was forfeited, on the authority of the Pandit of the Court, that "if a wife be unfaithful to her husband whilst she lives with him, or forsakes his home, she is in no way entitled to any part of his property or to maintenance; nay, her *stridhan* and her jewels should be taken from her, and she should be banished from her husband's house." This exposition of the law refers clearly to the case of unchastity during the husband's lifetime, though the Court held it applicable to a subsequent state, but the case is not precisely in point, as it refers to a share given for maintenance in an undivided family, and not to the estate a widow takes in a separated family. The other case was where a widow had been put in possession, on partition, after her husband's decease, of a share of the joint ancestral property, and had subsequently become unchaste, and the question decided was in respect of her power to make a valid devise of the property; it was held she could not do so, the Court remark-

(1) *Parvatikom Dhondiram v. Bhikukom Dhondiram*.

(2) *Doorgee v. Kashee Perskad*, S. D. A., N.-W.P., 1862, vol. i, p. 506; *Bulloo v. Ramdat*, same volume, p. 206.

ing "it is not contested that, admitting the fact of misconduct, the deed of gift was altogether illegal." The decision therefore does not directly decide the point before us, and both cases have reference to shares taken by widows for maintenance in estates held by co-proprietors, and will afford no certain rule for the case under discussion.

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It appears to me therefore that the rule of law which is now asserted is not one which is deducible from the Hindu law books, and that no custom to support the rule can be said to have come down to us in practice, supported by a course of decisions of the Courts, and therefore deserving consideration. On the contrary, the Hindu authorities speak with uncertainty; the highest English authorities are opposed to any such rule of law; and the few decisions of the Courts, in which the question can be said to have been unmistakably decided, give conflicting rulings, while the later decisions are opposed to the existence of such a rule of law.

My reply to the reference is that, under the Hindu law governed by the Mitakshara, a widow who has once succeeded to the separate estate of her deceased husband is not liable to forfeit that estate by reason of unchastity.

BRODHURST, J.—In this case the pleaders for Nehalo (the defendant), appellant, have relied entirely upon the judgments of the Chief Justice of the Calcutta High Court and of those his honorable and learned colleagues who concurred with him in *Kery Kolutany v. Moneeram Koluta* (1). On the other side nothing of any importance has, I think, been urged that has not been noticed at even greater length in the printed judgments of the case above alluded to.

From the Hindu texts referred to it is evident that it is only the chaste widow who is entitled to succeed to the estate of her childless husband, but I have not seen any passage of Hindu law pointed out which declares positively that a widow, after having duly obtained possession of the estate, can, simply on account of her subsequent incontinence, be deprived of it. I concur generally in the opinions expressed by the majority of the learned Judges in the case above alluded to, and I consider that the Full Bench ruling of the Calcutta High Court is also applicable to cases of a similar description in these Provinces.

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## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

ABADI BEGAM (PLAINTIFF) v. ASA RAM (DEFENDANT).\*

*Agreement affecting Land—Transfer of the Land—Covenant running with the Land.*

*S*, by an instrument in writing, duly registered, agreed, for valuable consideration, for himself, his heirs and successors, to pay his wife, *A*, a certain sum monthly out of the income of certain land, and not to alienate such land without stipulating for the payment of such allowance out of its income. He subsequently gave *L* a usufructuary mortgage of the land subject to the payment of the allowance. *L* gave *R* a sub-mortgage of the land, agreeing orally with *R* to continue the payment of the allowance himself. *Held*, in a suit by *A* against *L* and *R* for arrears of the allowance, that *A* was not affected by any agreement between *L* and *R* as to the payment of the allowance, and *R*, being in possession of the land, was bound to pay the allowance.

THE facts of this case were as follows : On the 26th February 1866 Maujad Ali Shah, who was indebted at that time to his wife, Abadi Begam, in a sum of Rs. 14,000, being her dower, by an instrument in writing, duly registered, covenanted for himself, his heirs and successors, to pay his wife Rs. 12 per mensem out of the income of certain land in lieu of dower. He further covenanted not to alienate the land without stipulating for the payment of this allowance. On the 1st December 1870 Maujad Ali Shah gave Lachman Singh a usufructuary mortgage of the land for seven years, stipulating in the deed of mortgage that the mortgagee should pay Abadi Begam Rs. 12 per mensem out of the income of the mortgaged property. On the 24th August 1874 Lachman Singh sub-mortgaged the land to Asa Ram, and gave him possession of it. At the time of this mortgage Lachman Singh agreed orally with Asa Ram to continue to pay Abadi Begam her allowance himself. The present suit was brought by Abadi Begam against Lachman Singh and Asa Ram for the arrears of the allowance. The Court of first instance gave the plaintiff a decree against Asa Ram alone. On appeal by Asa Ram the lower appellate Court reversed the decree against him, and gave the plaintiff a decree against Lachman Singh.

The plaintiff preferred an appeal to the High Court, contending that she was entitled to a decree against Asa Ram.

\* Second Appeal, No. 974 of 1878, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 29th July 1878, reversing a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 8th May 1878.

Pandit *Ajūdhia Nath* and Munshi *Sukh Ram*, for the appellant.

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Munshi *Hanuman Prasad* and Lala *Harkishen Das*, for the respondent.

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The judgment of the High Court was delivered by

SPANKIE, J.—The plaintiff's husband, by a deed registered on the 29th April 1866, settled upon her a sum of Rs. 12, in lieu of dower, to be paid monthly from the income of the rent-free land of Nagla Asadnagar, in mauzas Nurpura, Jasmai, Asmatpur, and Dhalawal, by himself, and his heirs and successors after him. If either he or any of his heirs or successors failed to make the payment monthly, the lady was at liberty to sue for the sum due in the Civil Court. The deed further provides that no transfer of the property shall be made unaccompanied by a condition providing for and securing the required monthly payment of Rs. 12 from the profits. When the plaintiff's husband, Maujad Ali Shah had subsequently mortgaged the property to Lachman Singh, one of the defendants, and to Madho Singh, on the 1st December 1870, it was recorded in the deed of mortgage that a monthly allowance of Rs. 12 was to be paid to the plaintiff. The first mortgagee acknowledged this fact. The first mortgagee subsequently, on the 24th August 1874, sub-mortgaged the property to Asa Ram, the other defendant. The plaintiff therefore sued him along with Lachman Singh, the first mortgagee, as being in possession of the lands from which the allowance was to be paid. The Munsif decreed against Asa Ram in favour of the plaintiff, exempting Lachman Singh. The Judge, however, held that there was no clause in the second mortgage-deed binding him to continue the payment of Rs. 12 monthly to the plaintiff, as had been the case in the first mortgage-deed with regard to the first mortgagee, and further he found that it was clearly shown by Asa Ram's witnesses that, at the time of entering into the sub-mortgage, Lachman Singh had bound himself to continue the payment, whereas the second mortgagee had never undertaken to pay it. Moreover, Lachman Singh's sons and others had purchased the proprietary rights in the property, and Lachman Singh's interest in it had never ceased. The Judge decreed Asa Ram's appeal, and gave the plaintiff a decree against Lachman Singh alone.

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It is contended that Asa Ram, sub-mortgagee, being in possession of the property charged with the payment of the monthly allowance of Rs. 12, is bound to pay it.

We are of opinion that the contention is right. The plaintiff is not affected by any arrangement made between Lachman Singh and Asa Ram. She looks to payment of her allowance from the income of the land charged with the burden of paying it, and therefore she has a claim upon the party who is in possession of the lands. In this case the sub-mortgagee, in accepting the mortgage from Lachman Singh, must have been aware of the conditions under which the latter had accepted the original mortgage, and therefore also must have been aware of the lien created by Manjad Ali Shah in favour of his wife, and which lien, with or without notice, extends to all persons claiming to hold the lands, to the extent of the amount of the profits set apart for the benefit of the plaintiff. With this view of the case we decree the appeal, reverse the decree of the lower appellate Court, and restore the decision of the first Court, with costs.

*Appeal allowed.*

### FULL BENCH.

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February 24.

*Before Sir Robert, Stuart, Kt., Chief Justice, Mr. Justice Pearson,  
Mr. Justice Turner, Mr. Justice Spinkie, and Mr. Justice Oldfield.*

HANUMAN TIWARI (PLAINTIFF) v. CHIRAI AND ANOTHER  
(DEFENDANTS).\*

*Hindu Law—Adoption of an only son.*

*Held* (TURNER, J., dissenting) that the adoption of an only son cannot, according to Hindu law, be invalidated after it has once taken place.

THE facts of this case were as follows: One Mata Bakhsh, claiming to be the adopted son of Durga Prasad, deceased, sold a certain dwelling-house, of which Durga Prasad had died possessed, to Chirai, on the 25th February 1874. The plaintiff in this suit, Durga Prasad's brother, claiming to be his heir, sued Mata Bakhsh and Chirai for a declaration of his right to, and possession of, the house, and the

\* Special Appeal, No. 5 of 1876, from a decree of J. W. Sherer, Esq., c. s. i., Judge of Mirzapur, dated the 27th September 1876, affirming a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Mirzapur, dated the 29th May 1876.

cancellation of the deed of sale, alleging, amongst other things, that Mata Bakhsh was not the adopted son of Durga Prasad, and that, admitting the adoption, the adoption was not valid, according to Hindu law, as Mata Bakhsh was the only son of his father. As to the fact of Mata Bakhsh's adoption by Durga Prasad, the Court of first instance held that such fact was fully established. As to the validity of the adoption, the Court held that, assuming that Mata Bakhsh was the only son of his father, and that the adoption of an only son was not valid according to Hindu law, yet the adoption in this case could not be deemed invalid, inasmuch as it had been recognised and acknowledged for a long period of time. On appeal by the plaintiff the lower appellate Court concurred in the views of the Court of first instance.

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The plaintiff preferred a special appeal to the High Court, in which he contended that the adoption of an only son was not valid according to Hindu law.

The Court (SPANKIE, J., and OLDFIELD, J.) referred to the Full Bench the question whether the adoption of an only son is altogether void, or whether, once having been made, such an adoption is valid.

Munshi Sukh Ram, for the appellant.

The Senior Government Pleader (Lala Juala Prasad), Munshi Hanuman Prasad, and Lala Lalta Prasad, for the respondents.

The following judgments were delivered by the Full Bench :

STUART, C.J.—I remain of the opinion which I formed at the hearing that the answer to this reference must be that the adoption of an only son is not altogether void, but that having once been made, the adoption is valid. Such is my conclusion on the authorities, which are, however, very conflicting, but the weight of them is clearly in favour of the validity of the adoption in question. In a Calcutta case (1) that was cited to us, the Judges being L. S. Jackson and Dwarka Nath Mitter, JJ., it was laid down (Mitter, J., being the Judge who delivered the judgment in his own name and that of his colleague), on the authority of certain passages from Dattaka Chandrika, that the adoption of an only son is forbidden by Hindu law. The judgment then proceeds: "It has been said that the prohibition contained in these passages amounts to nothing more than

(1) *Upendra Lal Roy v. Srimati Rani Prasannamayi*, 1 B. L. R., A. C., 221.



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a mere religious injunction, and that the violation of such an injunction cannot invalidate the adoption after it has once taken place. We are of opinion that this contention is not sound. It is to be remembered that the institution of adoption, as it exists among the Hindus, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion, and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and its temporal aspects are wholly inseparable." But Mr. Justice Mitter goes on to observe: "It is true that the doctrine of *factum valet* is to a certain extent recognised by the lawyers of the Bengal school; but if we were to extend the application, every adoption, when it has once taken place, will be, as a matter of course, good and valid, however grossly the injunctions of the Hindu Shastras might have been violated by the parties concerned in it. The case of *Chinna Gaundan v. Kumara Gaundan* (1) is no doubt in favour of the appellant, but for the reasons stated above, we are unable to concur with the learned Judges who decided that case. On the other hand we find two cases in our presidency which are directly in favour of the view we have taken, and what is of still greater importance, both these cases have been cited with approbation by Sir William Macnaghten himself." The cases thus referred to will be found in Macnaghten's *Hindu Law*, 3rd ed., vol. ii, p. 178. They appear to have been decisions in 1806 by the late Calcutta Sudder Dewanny Adawlat, but they are not of much weight, their reasoning against the validity of such an adoption being unsatisfactory and superficial. There was also quoted to us a dictum in a judgment of the Privy Council, which will be found in p. 50 of the appendix to Munshi Hanuman Prasad's useful collection of precedents in these terms: "Again if there is, on the one hand, a presumption that Guru Prasad would perform the religious duty of adopting a son, there is, on the other hand, at least as strong a presumption that Parmanand would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as a *dwayamushyayana*, or son to both his uncle and his natural father. This latter kind of adoption would not sever the connection of the child with his natural family." This view will, among other things, be found very fairly answered and disposed of

(1) 1 Mad. H. C. R., 54.

by Sir Thomas Strange in his well known work on Hindu law (1). He states the general principle relating to adoption to be that "one with whose mother the adopter could not legally have married must not be adopted." He then remarks: "Subject to this general principle, the nearest male relation of the adopter is the proper object of adoption. This of course is the nephew, or son of a brother of the whole blood, whose pretensions were, by the old law, such, that if, among several brothers, one had a son, he was so far considered to be common to all, as to preclude in every one of them the power of adoption. But the injunction of Menu has, in more modern times, been construed as importing only an intention to forbid the adoption of others, where a brother's son is obtainable." Further on he observes: "But the result of all the authorities upon the point is that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who, upon spiritual considerations, ought to have been preferred." Then on page 86 he says: "It is true that a brother's son, as such, inherits and performs obsequies to his uncle, dying without preferable heirs; but then it is as his nephew, not as his son; and the spiritual efficacy in the one and in the other case is considered to be different. To render him a substitute for a son, he must have been filiated. When, therefore, a Hindu has but one son, and it is agreed that his brother, having none, shall adopt him, the adopted in this case has vested in him accumulated rights and duties. Son by adoption to his adoptive parent, he remains so, to all intents and purposes, to his natural one, becoming *dwayamushyayana*, or son to both;" and he points out other restrictions which, however, he observes are inculcated, "but not always enforced; since, as in other instances, so with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are directory only, and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good; according to the maxim of the civil law, prevailing perhaps in no code more than in that of the Hindus, *factum valet quod fieri non debuit*." The High Courts of Calcutta, Madras, and Bombay have all ruled in favour of the doctrine of *factum valet*. In the Calcutta Court Sir Edward Ryan, C.J., in

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(1) See 4th ed. by Mayne, pp. 83-86.

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delivering judgment in *Sreemutty Joymoney Dossee v. Sreemutty Sibosowndry Dossee* (1), said: "The adoption of an only son is no doubt balameable by Hindu law, but when done it is valid." In Bombay the question was distinctly raised in the case of *Raje Vyyankatrao Anandrao Nimbalkar v. Jayavantrao* (2), before Warden and Gibbs, JJ., who were both of opinion that the adoption of an only son having once taken place, and the requisite ceremonies having been duly performed, cannot be set aside. Gibbs, J., in delivering his judgment, said: "The rulings of this Court, as shown from 2 Borr. p. 83, downwards, as also of the Calcutta Court, have been that an adoption once made cannot be set aside. If the adopted be not a proper person, the sin lies on the giver and receiver alone, but the adoption must stand. In the High Court of Madras the same doctrine was approved and applied in the case of *Chinna Gaundan v. Kumara Gaundan* (3), before Scotland, C.J., and Frere, J. In delivering judgment, Scotland, C.J., went carefully through all the authorities, concluding thus: "On the whole the case (i.e., the validity of such an adoption) is concluded by authority; but I must say, with all possible respect for Mr. Justice Strange, that upon principle and reason I should have felt myself bound to decide the point in the same way." This appears to be the Madras case alluded to in the judgment of Mr. Justice Mitter in the Calcutta case I have referred to. In a subsequent Madras case, *Singamma v. Vinjamuri Venkatacharlu* (4), before Bittlestone and Ellis, JJ., the law laid down by Scotland, C.J., was carefully considered and distinctly approved, and it appears to me to be sound and worthy of acceptance by us.

PEARSON, J.—The adoption of an only son is declared to be improper and is disapproved or prohibited by the Hindu law, but no text is shown to us declaring such an adoption to be void or voidable. The objections to such an adoption are its injurious consequences to the person who gives his son to another, and these consequences would not follow were the adoption a nullity. The view taken by Sir Thomas Strange that "the prohibitions respecting an eldest and an only son, where they most strictly apply, are directory only, and an adoption of either, however blameable in the

(1) 1 Fulton, 75.

(3) 1 Mad. H. C. Rep., 54.

(2) 4 Bom. H. C. Rep., A. C. J., 191.

(4) 4 Mad. H. C. Rep., 165.

giver, would, nevertheless, for every legal purpose, be good, according to the maxim of the civil law, prevailing perhaps in no code more than in that of the Hindus, *factum valet quod fieri non debuit* "appears to have been generally accepted, and is supported by a great weight of authority; and I am disposed to adopt it.

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SPANKIE, J.—I accept this view of the case. It does not appear that more can be said.

TURNER, J.—The rulings as to the validity of the adoption of an only son are cited at length in Mr. Mayne's admirable work on Hindu Law, ss. 126-133, and I need not further refer to them. It is sufficient to say that the rulings of the Courts are conflicting. I therefore feel myself at liberty to consider the question as unsettled, and in the absence of any evidence that the law enunciated by the commentators has been varied by custom, to rest my decision on the texts and principles which are to be gathered from their works. The object of adoption is the perpetuation of lineage and the spiritual benefits which accrue to the parent of a son, and in virtue of the benefits which he can render, the adopted son succeeds not only to the estate of the person who has adopted him, but to collaterals of that person, and to constitute a valid adoption, there must be a competent giver. The Mitakshara, ch. xi, s. xi, v. 11, expressly declares "an only son must not be given (nor accepted). For Vasishtha ordains: Let no man give or accept an only son." The Dattaka Mimansa, a work of high authority in these provinces, declares (s. iv, vv. 5 and 6) that a father is incompetent to give an only son, and (v. 4) that the offence of extinction of lineage is incurred both by the giver and the adopter; and again (s. ii, v. 38) the author recognising the force of prohibition declares it does not apply to the case in which the son of one brother is made common to another brother also. In the Vyavahara Mayukha, ch. iv, s. v, vv. 9, 11, the same prohibition is declared, and in the Dattaka Chandrika, s. i, vv. 27 and 29, the rule is distinctly based and supported by the text of Gaanaka,—“By no man having an only son is the gift of a son to be ever made.”

It is to be noticed that, although the Mitakshara, ch. i, s. xi, v. 12, goes on to declare that "nor though numerous progeny exists should an eldest son be given, for chiefly he fulfils the office of

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a son," neither in that work nor in any of the works to which I have referred is there any declaration that extinction of issue would follow the gift (as it obviously would not), nor is the limitation of the paternal power to make a gift extended to an eldest son. The Mitakshara also gives the reason for what appears to me a dissuasive rather than peremptory injunction: "By the eldest son as soon as born a man becomes the father of male issue."

On these grounds then that a father is incompetent to give an only son and that the object of adoption wholly fails if such a gift be attempted, I am of opinion that the adoption of an only son is invalid, and that the principle *feri non debet factum valet* cannot be applied. The consequence of the contrary ruling would be according to Hindu law, to inflict a penalty not only on the giver and receiver, but on the collaterals of the receiver, whose property might descend to a person solely entitled to claim it on account of benefits he is presumed to confer, but which he could not possibly confer.

OLDFIELD, J.—There appears to be no sufficient reason for considering that the prohibitions in the text-books in respect of the adoption of an only son are more than of the nature of moral injunctions, rendering the gift and acceptance of an only son blameable, as interfering with the perpetuation of the lineage of the giver—Dattaka Mimansa, s. iv, vv. 3, 4—but not invalidating the adoption when made. Balam Bhatta appears to consider the gift and acceptance as blameable, but no more. His annotation to v. 11, s. xi, ch. i of Mitakshara is, "So an only son should not be given, nor should such a son be accepted: the blame attaches both to the giver and to the taker *if they do so*." The act is declared blameable but not absolutely void, and the adoption would not appear to fail civilly in effecting in favour of the adopter the material object for which adoption is made, the perpetuation of lineage. This view has been taken by the chief authorities on Hindu law,—Strange, 4th ed. by Mayne, 87; Macnaghten, 3rd ed., vol. i, 67 (I do not find that the cases in pages 178-179 of vol. ii go so far as to decide that the adoption once made must be set aside),—and it has been enforced by the early decisions of the superior Courts, and, so far as I am aware, been maintained until now, with few exceptions, by the superior Courts, of the three Presidencies.

## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

BHAWANI AND ANOTHER (DEFENDANTS) *v.* MAHTAB KUAR AND  
OTHERS (PLAINTIFFS).\*

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March 8.

*Hindu Law—Widow's Estate, Forfeiture of—Unchastity during Widowhood.*

It is sufficient for the protection of a Hindu widow's right to her husband's estate from forfeiture by reason of unchastity that such right has vested in her before her misconduct. It is not necessary for such protection that she should have acquired possession of the estate before her misconduct.

THE facts of this case, so far as they are material for the purposes of this report, were as follows: One Dario Singh died in 1860 leaving him surviving two widows, Ganesh Kuar and Bhawani, three daughters, his mother, and a sister. On his death Ganesh Kuar's name alone was recorded as the proprietor of his landed estate. Ganesh Kuar died in 1870, and on her death a dispute arose between one Maharaj Singh, styling himself the legitimate son of Dario Singh, on the one side, and Dario Singh's mother and Bhawani on the other, as to the mutations to be made in the revenue registers consequent on Ganesh Kuar's death. In November 1871, the settlement officer directed that Maharaj Singh, Dario Singh's mother, and Bhawani should each be recorded as the proprietor of one-third of the landed estate of Ganesh Kuar. Subsequently Maharaj Singh sued for the shares recorded in the names of Dario Singh's mother and Bhawani, on the ground that he was the legitimate son of Dario Singh. This suit was dismissed. In 1873 Dario Singh's mother died, and on her death Maharaj Singh's name was recorded as the proprietor of her share. The present suit was brought by Dario Singh's sister against Maharaj Singh and Bhawani for the possession of the entire landed estate of her brother. The defendants set up as a defence to the suit, amongst other things, that the suit was not maintainable by the plaintiff in the presence of Dario Singh's daughters. Subsequently the Court of first instance made Dario Singh's daughters plaintiffs in the suit, and, with their consent,

\* Regular Appeal, No. 153 of 1874, from a decree of Maulvi Muhammad Abdul Majib Khan, Subordinate Judge of Shahjahanpur, dated the 25th September 1874.

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allowed Dariao Singh's sister to remain in the suit as a plaintiff. The Court gave the plaintiffs a decree, Dariao Singh's sister taking one moiety of his estate, with the consent of his daughters, who took the remaining moiety. The Court held that Bhawani, who had given birth to an illegitimate child in 1869, had forfeited her husband's estate by reason of her unchastity. It was of opinion that, assuming that, under Hindu law, a Hindu widow who has once inherited the estate of her husband does not forfeit that estate by reason of subsequent unchastity, that law did not apply, inasmuch as Bhawani did not acquire possession of her husband's estate until Ganesh Kuar's death in 1870, or after her misconduct. The Court further held that Maharaj Singh had no title to the property in his possession, not being the legitimate son of Dariao Singh.

The defendants preferred an appeal to the High Court, contending, among other things, that the fact that her husband's estate had vested in Bhawani before her misconduct was quite sufficient to protect her right from forfeiture, and possession was not necessary for such protection.

Pandit *Ajudhia Nuth* and Munsahi *Sukh Ram*, for the appellants.  
*Lala Latta Prasad*, for the respondents.

The judgment of the Court was delivered by

PEARSON, J.—There are no grounds for holding that Musammat Bhawani, defendant, appellant, became unchaste during the life of her husband Dariao Singh. He died in 1860, and her illegitimate child would seem to have been born in or about 1869. It may be concluded therefore that the right of inheritance to her husband's estate jointly with his other wife, Musammat Ganesh, had vested in her by law long before she was guilty of misconduct. The lower appellate Court considers that nevertheless she has forfeited that right by her misconduct because she had not acquired possession of her husband's estate before the death of his elder wife in 1870. His reason for thinking that she did not acquire possession of her husband's estate until after Musammat Ganesh's death is merely that the latter's name only was recorded after Dariao Singh's death. But the reason does not seem to be a good one. Musammat Ganesh, when her name was recorded as her husband's heir

acknowledged the joint heirship of Musammat Bhawani, and there is no reason to doubt that the latter continued to live in her husband's house, and to be supported out of his estate, with the other widow. Musammat Ganesh was probably the head of the house and the manager of the estate, but Musammat Bhawani cannot be regarded as having been out of possession. But, however this may be, we conceive it to be sufficient for the protection of her right that it had vested in her by law before her misconduct. In her presence none of the plaintiffs have any right to succeed to the estate of Dariao Singh aforesaid. It is unnecessary to discuss the question of the legitimacy of the defendant, appellant, Maharaj Singh. We decree the appeal with costs, and dismiss the suit by reversal of the lower Court's decree.

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*Appeal allowed.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

KHETA MAL (DEFENDANT) v. CHUNI LAL (PLAINTIFF).\*

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*March 8.*

*Arbitration—Insolvency—Contract—Act IX of 1872 (Contract Act), s. 65.*

K, on the one part, and his creditors including C, on the other part, agreed in writing to refer to arbitration the differences between them regarding the payment of his debts by K. The award compounded K's debts, and assigned his property to his creditors, and directed that K should dispose of such property for their benefit, and that, if he misappropriated any of the property he should be personally liable for the loss sustained by the creditors on account of such misappropriation. C signed the award amongst other creditors, but the award was not signed by all the creditors. C received a dividend under the award. *Held*, in a suit by C against K, to recover a debt which had been compounded under the award, in which suit C alleged that several creditors had not signed the award; that some of them had sued K and recovered debts in spite of the award; that K has misappropriated some of the property; and that, if the plaintiff did not sue, there would be no assets left to satisfy his debt, that such suit was not maintainable.

THE facts of the case were as follows: By an instrument in writing dated the 9th May 1877, the firm of Kheta Mal and Kashi Nath on the one part, and the creditors of that firm, amongst whom was one Chuni Lal, on the other part, agreed to refer the differences between them to arbitration. The arbitrators appoint-

\* Second Appeal, No. 670 of 1878, from a decree of H. G. Keene, Esq., Judge of Agra, dated the 1st March 1878, affirming a decree of Babu Avinash Chandar Banarji, Munsif of Agra, dated the 19th September 1877.



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ed by the parties delivered an award, dated the 10th May 1877, in the following terms : " Whereas Kheta Mal and Kashi Nath on the one part, and Hazari Lal and the other persons hereinafter mentioned, have appointed us arbitrators to settle the disputes between them regarding *hundis*, purchase and sale of goods, debts, &c., appertaining to the firm of Kheta Mal and Kashi Nath, and have signed a duly stamped agreement to that effect, after examining the account-books and taking evidence, it appears that Kheta Mal and Kashi Nath had transactions with all the said creditors by way of *hundis*, &c.; and it appears that Rs. 21,502 is due to the creditors on account of *hundis*, &c., by Kheta Mal, and at present Kheta Mal has no cash, nor can he get any from which the debts could be liquidated, and the creditors are pressing Kheta Mal for payment, but Kheta Mal has stores, &c., to the value of about Rs. 16,569-13-6, including cash, Rs. 104, and outstandings, Rs. 2,892-13-6, which are now in his possession, and these stores are kept in different shops, i.e., three shops, and a "*mukkan*" of Musammatt Janki, also in a shop of Ganga Prasad and other places, and besides these stores Kheta Mal has no cash, immoveable property, nor jewels from which these debts could be realised : there is a difference of Rs. 4,632-2-6 between Kheta Mal's assets and liabilities, and this deficiency can in no way be made up : the firm of Kheta Mal and Kashi Nath has failed, and there is no hope of the Rs. 4,632-2-6 being hereafter liquidated : we have, therefore, awarded that in payment of the said sum of Rs. 21,502 the stores, &c., now in Kheta Mal's possession, amounting to Rs. 16,569-13-6, be made over to the creditors : and the creditors have released Kheta Mal from the payment of the said balance of Rs. 4,632-2-6 : now there is no claim for these debts by the creditors against Kheta Mal and Kashi Nath, nor, will there be any such claim hereafter : and Kheta Mal and Kashi Nath have no claim to the stores, &c., now in their shops, nor will they have such claim hereafter, but Kheta Mal and Kashi Nath shall sell these stores, &c., on the part of the creditors, and shall engage Bankey Lal, son of the one and brother of the other, and shall act as "*gomashtas*," these three men shall manage the affairs for four months, getting a consolidated salary of Rs. 30 per month : the proceeds of cash-sales and realised debts shall be made over every evening and accounts rendered to Gobind Ram,

Her Sahai Mal, Chuni Lal, or to any one appointed by them : the keys of the shops shall be made over to the person appointed to be in charge : if the stores, &c., are not all sold within four months Bankey Lal and Kashi Nath shall leave the shop and carry on their own work, leaving Kheta Mal only to sell the balance on a salary of Rs. 10 per month : Kheta Mal may draw his salary daily or monthly, if his salary is not paid, Kheta Mal need not serve : if Kheta Mal realises any sums on account of stores sold from the shop, or if he has previously so realised any sums, or if he misappropriates any of the property, or if he acknowledges the claims of any other parties, Kheta Mal and Kashi Nath will be responsible for the payment of such sums and for the defence of such claims : if Kheta Mal or Kashi Nath collusively allow a suit to be instituted against them, they shall be liable to pay the amount of the decree, the property made over by this award shall not be liable for the payment of such decree, nor will the decree-holder be entitled to recover from this property, because up to-day's date, except those persons on account of whose claims this property has been made over, there are no other creditors, inasmuch as their claims have not been admitted before us, nor are their names entered in Kheta Mal's account-books : the rents of the shops and houses shall be paid by the creditors and not by Kheta Mal and Kashi Nath : no further claims remain between the parties and both parties are agreeable to be bound by this our award and have signed this award."

This award was signed by Chuni Lal, amongst other creditors, but it was not signed by all the creditors who had signed the agreement to refer to arbitration, some of them refusing to sign it. On the 11th May 1877, by an instrument in writing which recited that Kheta Mal, Kashi Nath, and Bankey Lal had entered into the service of the creditors, the former bound themselves to perform faithfully the duty of selling the property assigned under the award, and to render accounts, and empowered the creditors in case of any misappropriation of the property, to sue to recover the value of the property misappropriated. On the 13th September 1877 the present suit was instituted by Chuni Lal against Kheta Mal to recover Rs. 878-14-0 on two *hundis*, being a debt which had been compounded under the award. The defendant set up as a

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defence to the suit that the plaintiff could not maintain the suit in the face of the award. The plaintiff contended that the award was not binding on him on the ground that all the creditors had not signed it; that several of the creditors who had not signed it had sued and had recovered their debts from the property assigned under the award, and that the defendant had fraudulently disposed of some of such property. The Court of first instance held that the suit was maintainable and gave the plaintiff a decree. On appeal by the defendant the lower appellate Court also held that the suit was maintainable for the reasons set forth in its judgment, the material portion of which was in the following terms: "Did the respondent (plaintiff) make with the appellant (defendant) a complete and valid contract by virtue of which his original right under the bills was foregone, and another right substituted for it to which he is now confined; or is he at liberty to treat that contract as incomplete and void and to fall back upon his original right under the bills? I have no hesitation in concluding that the contract or compromise between the parties was never carried out. The respondent has admitted that he received a sum of money under its provisions, but he has made restitution by suing for the balance due to him after crediting the amount. In so doing he has made the restitution required by s. 65 of the Contract Act, if the agreement is void. That it is so seems plain to me. It arose out of a proposed composition between the appellant and the whole of his creditors, by virtue of which they were to sign a deed releasing him from immediate liability and appointing their agent to carry on the business for their benefit. The respondent signed the deed, and the arbitrators handed him his dividend under the proposed composition. But about one-third of the creditors afterwards refused to sign; and the appellant, instead of conducting his business as the common agent of all and for their common benefit as he had engaged to do, made separate arrangements with some of the others. On this the respondent was perfectly justified in regarding the contract as a lapsed and void agreement, and in suing on his original right, restoring the amount received as dividend. I annex an English abstract (for which I am indebted to the pleader for the respondent) from which it will be seen that the signature of all the creditors and the

*bond fide* management of the business for the joint benefit of all were essential conditions, the non-fulfilment of which affected the whole consideration of the agreement, and rendered it void and of no effect. With reference to the fourth plea, I may observe that no specific point was stated as to which the account-books would give satisfaction to the Court's doubts. There was proof on the record, and in the corroborative papers called for from the Court of Small Causes, to show that the business had not been carried on in good faith for the common benefit of all the creditors, as it ought to have been under the terms of the agreement in virtue of which the composition was allowed. I therefore uphold the award of the lower Court and dismiss the appeal with costs."

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The defendant appealed to the High Court, contending that the suit was not maintainable.

Mr. Conlan and the Junior Government Pleader (Babu Dwarka Nath Banarji), for the appellant.

Munshis Hanuman Prasad and Sukh Ram, for the respondent.

The following judgments were delivered by the Court:

SPANKIE, J.—Respondent admitted in his plaint that he agreed to the arbitration and the award made by the arbitrators, in which a composition was made between the creditors of defendant, appellant, and defendant himself. He admits that he signed the award, and it is certain that he accepted payments towards the satisfaction of his debt, due by defendant on his failing to meet two *handis* when they fell due. But plaintiff avers that several of the creditors did not accept the award, and some had sued and recovered debts due to them in spite of the award: also the defendant had acted dishonestly, and had made away with some of the goods over which he was placed in charge by the award and the creditors who signed it: plaintiff was therefore compelled to sue, as there were not sufficient assets left to satisfy his debt and the debts of the others who were also suing defendant.

But it appears to me that the plaintiff and all persons who signed the award and were parties to and signed the agreement to refer to arbitration are bound by their acts. The arbitrators decided that there were not sufficient assets to discharge all the debts

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due to that of the creditors, but the latter should surrender their claims to a sum Rs. 4,632-2-6, which is mentioned in the award as irrecoverable, and that the stores, &c., now in the defendant's possession should be made over to the creditors for their benefit. The award goes on to say that the creditors "have released Kheta Mal from the payment of the said (irrecoverable) balance of Rs. 4,632-2-6 : now there is no claim for these debts by the creditors against Kheta Mal and Kashi Nath, nor will there be any claim hereafter, and Kheta Mal and Kashi Nath have no claim to the stores, &c., now in their shops, nor will they have any claim to them hereafter. But Kheta Mal and Kashi Nath shall sell these stores, &c., on the part of the creditors, and shall engage Bankey Lal, son of Kheta Mal and brother of Kashi Nath, and shall act as *gomashtras* : these three men shall manage the affairs for four months, getting a consolidated salary of Rs. 30 per mensem." Then come some other less important conditions and the award proceeds : "If these stores are not all sold in four months, Bankey Lal and Kashi Nath shall leave the shop and carry on their own work, leaving Kheta Mal alone to sell the balance on a salary of Rs. 10 per mensem."

There are certainly the following conditions : "If Kheta Mal realises any sums on account of stores sold from the shop, or if he has previously sold any, or realised any sums, or if he misappropriates any of the property, or if he acknowledges the claim of any other party, Kheta Mal and Kashi Nath will be responsible for the payment of such sums and for the defence to such claims : if Kheta Mal and Kashi Nath collusively allow a suit to be instituted against them, they shall be liable to pay the amount of the decree : the property made over by this award shall not be liable for the payment of such decrees, nor will such decree-holders be entitled to recover from this property, because up to-day's date, except those creditors to whom this property has been made over, there are no other creditors, inasmuch as their claims have not been admitted before us nor are their names entered in Kheta Mal's account-books : no further claims remain between the parties and both parties agree to be bound by our award."

Now, from these extracts it is quite apparent that there are no conditions such as those referred to by the lower appellate Court

which rendered the agreement void or voidable. The defendant is made responsible under the award. No right is given to the plaintiff to rescind the agreement and repudiate the award and fall back upon his dishonoured *hundis*. The Judge's application of s. 65 of the Contract Act to this case altogether fails. The very fact that the plaintiff received on two occasions moneys in satisfaction of his claim under the award shows incontestibly that the award was carried out, and was in full operation when the suit was brought. The agreement entered into for the satisfaction of the claims of creditors was a new contract substituted for former contracts between creditors and defendant. This agreement was never discovered to be void, nor had it become void by any circumstances making it so. The defendant was the paid servant of the creditors as manager of the stores, and if he misappropriated them or behaved fraudulently, they could proceed against him and hold him responsible for losses, but only under the award. If creditors who had not signed the award obtained decrees, the creditors who had signed it could only protect themselves under the terms of the award. They could not rescind the award and fall back on their old debts in satisfaction of which the defendant had assigned all his property for the benefit of his creditors. As the award declares : "Now, there is no claim for these debts by the creditors of Kheta Mal and Kashi Nath, neither will there be any such claim hereafter, and Kheta Mal and Kashi Nath have no claim to the stores now in the shops."

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I am clearly of opinion that the suit was not one that could be maintained, and that it should have been dismissed. I would decree the appeal and reverse the decrees of both the lower Courts with costs.

STUART, C.J.—I agree in the conclusion arrived at by Mr. Justice Spankie. Both the lower Courts have utterly mistaken the law applicable to this case. There is no bankruptcy law in these provinces, nor any coercive legal process which can be enforced against the property of an unwilling insolvent for the benefit of all his creditors. A person in the position of the present defendant, appellant, may avail himself of the provisions of the Code of Civil Procedure for the purpose of being relieved of his debts, but he can

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only do so under the conditions of that Code, he himself being the applicant, and under executed process by arrest or imprisonment. No such result can be attained by the legal action of any or even all of an insolvent's creditors. Doubtless creditors and their debtors can agree as to the disposal of property for the benefit of the former, and that is an agreement of course that can be given effect to. But irrespective of such an agreement among a debtor and his creditors, the law, at least in these provinces, places no compulsory machinery in the hands of the creditors as a body. On the other hand, there is no law in this country to prevent a debtor from making an assignment of his estate for the benefit of all or a limited class of his creditors; nor, for that matter, from his assigning, conveying, or settling his estate in favour of any person or persons whom he may wish to favour, provided of course that he makes those assignments, settlements, or conveyances without fraud, that is, honestly and in good faith. The fundamental principle that underlies this state of things is that, so long as the law does not step in to deprive a man of his control over his estate, he remains *sui juris*, and can up to the last moment of its possession deal with his property as he thinks fit. The legal right remains in him, and if he acts honestly and in good faith, and not fraudulently, he may transfer his estate, or any portion of it, to any one or more of his creditors, but whose acceptance of such transfer or assignment, or whatever the form of the conveyance may be, of course deprives them of all further relief against their debtor, and the only remedy of other persons to whom he is indebted, and who have by that means been excluded from any such transfer, assignment, or other conveyance, can only be against such property of the debtor as may not have been so dealt with, or against the debtor's person.

Now, applying these legal principles to the present case, there can be no doubt that the agreement between Kheta Mal and those creditors of his who joined with him in the arrangement was in effect such a transfer or conveyance as I have referred to, and the plaintiff, being one of the creditors who accepted that mode of settlement, is bound by it, and cannot recover any balance that may remain over after the event of the award in the arbitration proceedings; and the fact that he had on foot of the award accepted

payments from the sale of the defendant's goods only still further weakens his contention that he has a surviving right of action against his debtor.

I must here observe that a more extraordinary misreading of a plain law than that afforded by the recorded opinion of the Judge as to the application of s. 65 of the Contract Act to the facts of the present case I never met with. That section of the Contract Act is in the following terms: "When an agreement is discovered to be void, or where a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it." So that, according to the Judge, the payments made to the plaintiff in the present case is merely an advantage for which compensation may be made by being credited to the debtor as against his *hundis*. Now, there was here no void contract, no contract void in any sense, but the arbitration proceedings between Kheta Mal and his other creditors who are parties thereto, including Chuni Lal, the plaintiff, constituted, together with the award made by the arbitrators, a good and sufficient contract, valid and effectual, against the plaintiff and those other creditors in the same position, and all these persons are thereby concluded against any further remedy *ultra* the arbitrators' award.

The present appeal must therefore be allowed, the decrees of both the lower Courts reversed, and the suit dismissed with costs in all the Courts.

*Appeal allowed.*

## FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*

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March 11.

**NANAK CHAND AND ANOTHER (DEFENDANTS) v. RAM NARAYAN (PLAINTIFF).\***

*Act VIII of 1859 (Civil Procedure Code), ss. 323, 324—Arbitration.*

The plaintiff in this suit sued the defendants to recover certain moneys presented to him on his marriage, which alleged the defendants had received and appropriated to their own use. The defendants denied that they had

\* Appeal under cl. 10, Letters Patent, No. 5 of 1877.



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received such moneys, but admitted that such moneys had been credited by the plaintiff's father to the firm in which they, the plaintiff, and the plaintiff's father, were jointly interested, against a larger amount of moneys belonging to the firm which had been expended on the plaintiff's marriage. The parties agreed to refer the matter in dispute between them to arbitration, and to abide by the decision of the arbitrator. The arbitrator decided that the plaintiff could not recover the moneys he sued for, and which had been credited to the firm of which he was a partner, as a larger sum had been expended on his marriage out of the funds of the firm. The plaintiff obtained the opinions of certain *pandits* to the effect that, under Hindu law, gifts on marriage are regarded as separate acquisitions, and prayed that the Munsif would remit the award with these opinions to the arbitrator. The Munsif remitted the award with the opinions, requesting the arbitrator to consider them, and to return his opinion in writing within a certain period. The arbitrator having refused to act further, the Munsif proceeded to determine the suit, and gave the plaintiff a decree on the ground that, in a joint Hindu family, presents received on marriage do not fall into the common fund. *Held* (PEARSON, J., dissenting) that, there being no illegality apparent on the face of the award the Munsif was not justified in remitting the award, or in setting the award aside and proceeding to determine the suit himself, but that he should have passed judgment in accordance with the award.

THIS was a suit instituted in the Court of the Munsif, in which the plaintiff claimed to recover Rs. 520, being the amount of the presents received at his marriage, which he alleged had been taken and appropriated by the defendants, his uncles. The defendants set up as a defence to the suit that a sum of Rs. 1,132-2-0 had been expended on the plaintiff's marriage out of the funds of a firm in which the plaintiff, his father, and they were partners, that they had not received the sum claimed, but that the plaintiff's father had received and expended a sum of Rs. 549 which had been presented to the plaintiff on his marriage, and that the plaintiff's father had entered the sum claimed in the books of the partnership to the credit of the firm, but that no sum on account of marriage presents had ever come into their hands. On the 17th June 1875 the parties to the suit presented a petition to the Munsif appointing a certain person arbitrator, and agreeing to accept whatever such person should decide. The Munsif referred the suit to the arbitrator for the determination of the matters in dispute. On the 12th July 1875 the arbitrator delivered his award in the following terms : " It is admitted by both parties that up to this time the plaintiff, his father, and the defendants, carry on business in partnership, and that they are the joint owners of the firms known as Ganga Bai Chain Sukh : it is admitted by the plaintiff that nearly Rs. 1,000 was ex-

pendent on his marriage from the joint firm ; therefore the plaintiff cannot get back Rs. 520 which he received at his marriage, and which were credited in the joint firm opposite the debit side, no matter if he paid that amount to the defendants or to his father : this point is out of question, because the amount is credited in the account books of the joint firm." The pleaders of the plaintiff subsequently obtained the opinions of certain *pandits* who averred that under Hindu law gifts at marriage are regarded as separate acquisitions, and applied to the Munsif to remit the award with these opinions to the arbitrator. The Munsif, without declaring that an objection to its legality was apparent on the face of the award remitted the award with the opinions, and requested the arbitrator to consider them, and to return his opinion in writing within a week. The arbitrator declined to act any further in the matter, stating, amongst other things, that his award had not proceeded merely on the facts of the case, but that he had referred to certain texts of the Hindu law which the parties had produced. The Munsif then proceeded to determine the suit, and gave the plaintiff a decree, which the lower appellate Court affirmed, on appeal by the defendants.

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The defendants preferred an appeal to the High Court, contending that the Munsif was not competent to set aside the award. The Judges composing the Division Bench (PEARSON, J., and SPANKIE, J.) before which the appeal came for hearing differed in opinion, as to whether or not the Munsif was justified by law in remitting the award, or in setting the award aside and determining the suit himself.

The judgment of the Judges of the Division Bench were as follows :

PEARSON, J.—I concur with the lower appellate Court in the opinion that the Munsif was warranted, under the terms of s. 323 of Act VIII of 1859, in remitting the award, which was apparently illegal, for reconsideration on the point of law ; and that, inasmuch as the arbitrator declined to determine the point, the award became incomplete and null ; and I hold that, under the circumstances, the provisions of s. 324 are inapplicable, and that the Munsif was competent to set aside the award, so incomplete and null, and to proceed to try and decide the case himself. I further

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hold that the Hindu law, if not by law expressly applicable to the case, was the law which equity, justice, and good conscience required to be applied to it. I would therefore dismiss the appeal with costs.

SPANKIE, J.—The parties to the suit of their own free will appointed Lala Sham Lal, a pleader of the Court, their arbitrator, and agreed to accept whatever might be his decision in the case. An order dated the 17th June was sent to the arbitrator to decide the case and send in his award and the papers embodying the result of his inquiries, and that copies of the papers in the case be sent to him. On the 12th July the arbitrator submitted his award. He states that he had investigated the case, and had taken down the depositions of the witnesses and the statements of the parties. He had also taken into consideration the *custom of the brotherhood*, and perused the *passages in the Hindu law referred to by the parties and their pleaders*. It is admitted, he adds, by both parties that up to date the plaintiff, his father, and defendants carry on business in partnership, and that they are the joint owners of the firm known as Ganga Bai Chain Sukh: it is admitted by the plaintiff that nearly Rs. 1,000 were expended on his marriage from the joint firm: therefore the plaintiff cannot get back Rs. 520 which he got on marriage, and which were credited in the joint firm opposite to the debit side, no matter if he paid that amount to the defendant or to his father: this point was out of question, because the sum was credited in the account books of the joint firm: with reference to the circumstances of the case, it did not appear proper to award costs to defendants. The result of this award was to dismiss the claim, both parties bearing their own costs. No exception was taken to this award, which, indeed, the referring Court pronounced to be “admirable and excellent.” But on the 22nd July the plaintiff objected to the arbitrator’s law, and on the 9th August he presented to the Munsif an exposition of the law by some Hindu *pandits* at Benares. The Court, stating that the exposition of the law differed from the view of the Hindu law relied upon by the arbitrator, ordered that the award should be returned to the arbitrator in order that he might consider the law as expounded by the *pandits*, and submit his opinion in writing about it. The arbitrator stated his inability to determine the case, and declined to act any further in it.

The Munsif took up the case and decreed the plaintiff's claim, and the lower appellate Court affirmed the decree. It is contended by defendant that the Munsif had misapprehended s. 323 of Act VII of 1859, and should not have referred the award back to the arbitrator: no award can be set aside except as provided by s. 324 of Act VIII of 1859.

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I would accept the pleas in appeal. The award had not left undetermined any of the matters referred to arbitration, nor had it determined matters not referred to arbitration. It was not so indefinite as to be incapable of execution. Looking at the terms of s. 323, the only other ground on which an award could be remitted is that an objection to its legality was apparent on the face of the award. No exception to the award was taken under s. 324. But on the 22nd July the plaintiff objected that the *Shastras* were in his favour, and it was brought to the Court's notice, and nearly a month after the delivery of the award, that a *pandit* at Benares expounded the law differently from the arbitrator. Now the parties had agreed to abide by the decision of the arbitrator. His view of the law might be right or wrong, but there is no illegality apparent on the face of the award which justified the remission of the award to the arbitrator. It was as if the plaintiff had asked for a review of judgment, and produced fresh evidence in his own favour. Where parties agree to abide by the decision of an arbitrator, both are supposed to concede something, and they are, I think, bound to abide by the decision, though, perhaps, a Court might have determined the point differently. I would decree the appeal and reverse the decision of both Courts and enforce the award.

The defendants appealed to the Full Court under cl. 10 of the Letters Patent against the judgment of Pearson, J., again contending that the award could not be set aside.

Mir Akbar Husain, for the appellants.

The respondent did not appear.

The following judgments were delivered by the Full Bench:

STUART, C.J.—The procedure before the Munsif in this case appears to me to have been most irregular. Under s. 323 of Act VIII of 1859 the Munsif could only remit the award for reconsi-

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deration if an objection to its legality is apparent *on the face of it*. But instead of considering the matter in this simple light the Munsif, on the 9th August 1875, made the following extraordinary and anomalous order: "Apparently it appears that the principles of Hindu law relied upon were decided against the petitioner in the arbitration award: therefore it is ordered that the award may be sent to the arbitrator to consider the *bywasthas* attached to this petition, and submit his opinion in writing to the Court." Or as if he said in other words, "It appears that the principles of Hindu law were applied by the arbitrator, but something more is wanted, and 'therefore' the award must go back to him for reconsideration." If such is not the meaning of the order, he *therefore* should have led to the very different conclusion of the award being accepted and applied by the Munsif, especially as he had admitted in his judgment not only that "the inquiry and award made by the arbitrator are admirable and excellent," but that the award was "in conformity with the evidence on the record."

It will be seen that, instead of showing that the award is illegal "on the face of it," the Munsif expresses his order in terms that ought to have led him to the opposite conclusion, but nevertheless he at the same time, and ss. 323 and 324 of Act VIII of 1869 notwithstanding, entertains the complaint that the findings in the award were opposed to the authorities in Hindu law relied upon by the plaintiff, and for this reason, and for this reason alone, he orders that the award may be sent back to the arbitrator for reconsideration, but admitting notwithstanding, so far as the language of his order is concerned, that the principles of the Hindu law had evidently been considered in making the award, in other words, that the arbitrator had done his duty. Such procedure not only cannot be allowed to stand for one moment, but in my opinion is deserving of the severest censure. Nor does the arbitrator, finding himself placed in the position assigned him by this foolish order, appear to have been a whit more intelligent in the matter than the Munsif, for he submitted himself uncomplainingly to it, and only noticed it by a petition, dated the 28th of August, in which he referred to the bad state of his health and the difficulties of the case, among others, certain Sanskrit texts which he had been unable

to understand or to get satisfactorily translated for him. In this petition, however, the arbitrator goes chiefly upon his bad health and his consequent inability to proceed with the case. He therefore declines to act any further, and he begs the Court either to decide the case itself or to appoint another arbitrator in his stead. The Munsif adopted the former course, proceeded with the case, and decreed the plaintiff's claim, which decree was affirmed by the lower appellate Court.

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All this procedure was utterly mistaken. I have carefully perused the award, and in my judgment it shows no illegality on the face of it. It recites the reference to the arbitrator for his decision, and then it states as follows : "I have investigated the case to my satisfaction, and have taken down the depositions of witnesses and the statements of the parties. I have also taken into consideration the custom of the brotherhood to which the parties belong, and *perused the passages in the Hindu law referred to by the parties and their pleaders.*" Now in the face of such a statement the Munsif had no right to assume that the arbitrator had not correctly applied the Hindu law. Any error of the kind must appear on the face of the award itself, which, however, on the contrary states "he had perused the passages of the Hindu law referred to by the parties and their pleaders." This I consider was a sufficient compliance with his duty as an arbitrator under the Code of Procedure, Act VIII of 1859, and if the Munsif differed from him, and believed that he had not correctly applied the principles of the Hindu law, the award was not thereby rendered invalid, and ought not to have been remitted for reconsideration, for on the face of it it was right, and it is distinctly provided by s. 324 of Act VIII of 1859 that "no award shall be liable to be set aside except on the grounds of corruption or misconduct of the arbitrator or umpire. In fact, in accepting him as their arbitrator, the parties accepted his judgment and opinion, and his understanding of the Hindu law applicable to the case, and were bound by his judgment and opinion and his law, no matter how mistaken he may have been in these respects. And the Munsif who, as I have shown, admits in his judgment that the award was excellent and admirable and unimpeachable on the evidence, was bound by it too, and he ought to have given judgment

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according to it, his judgment being final and not open to appeal to the Judge or Subordinate Judge.

Holding this opinion, and I must add holding it very clearly, I would, concurring with Mr. Justice Spankie, allow this appeal, and reverse the judgment of the Division Bench, and I would set aside the whole procedure before the Munsif subsequent to the filing of the arbitrator's award, and order a decree by this Court according to the award, and dismiss the suit, with costs, in all the Courts.

PEARSON, J.—The question to be determined by the Full Bench is, I presume, whether the judgment which is the subject of the present appeal rightly or wrongly disposed of the special appeal heard by the Division Bench. If reference be made to the grounds of the special appeal, it will appear that two substantial questions are raised by it, first, was the Munsif justified in remitting the award for consideration; second, was he justified in setting it aside when the arbitrator refused to reconsider it. The first of these questions will include the applicability of the Hindu law to the matter in dispute. The plaintiff claimed to recover from his uncles a sum which he had received from his father-in-law as a marriage present, and which, he alleged, they had appropriated to their own use. Their defence was that they had not taken it but that it had been expended on this marriage by his father. The matter being referred to arbitration, the arbitrator disallowed the claim, because the sum claimed had been entered in the accounts of the family firm, as a set-off against the plaintiff's marriage expenses. The award is obviously unsatisfactory, but on the plaintiff objecting that it was opposed to Hindu law, and filing *bywasthas* in support of the objection, it appeared to the Munsif that it was bad in law. This being so, I conceive that he was not only justified in remitting it for reconsideration, but was bound to remit it. Both the lower Courts have now decided that the plaintiff's claim is valid under the Hindu law. It was not pleaded in the special appeal, and it is not pleaded in the present appeal, that the lower Court's exposition of Hindu law is erroneous. What was pleaded in the special appeal was that the Courts were not bound to apply the Hindu law to the case. I ruled that the Hindu law, if not by statute law expressly

applicable was the law which equity, justice, and good conscience required to be applied to the case. It is now pleaded that my ruling is incorrect. I entertain no doubt of its correctness myself, and I shall be surprised if the plea should find its acceptance.

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On the other question whether, on the refusal of the arbitrator to reconsider his award, the Munsif was justified in setting it aside and proceeding to try the case himself, I do not perceive that my honorable colleague on the Division Bench in the judgment delivered by him on the 28th June 1877, expressed an opinion different from that expressed by me. It is obvious to remark that, if the Munsif was precluded from setting aside the award in this case by the provisions of s. 324 of Act VIII of 1859, he would be precluded from so doing in a case in which an arbitrator refused to reconsider an award which left undetermined some of the matters referred to arbitration, and was so indefinite as to be incapable of execution ; and such a contention could not probably be maintained.

In my judgment the pleas in appeal are without weight, and the appeal should be dismissed with costs.

TURNER, J.—(After stating the facts leading up to the arbitration and award, continued) : The plaintiff's pleader obtained the opinions of some *pandits* who averred as is not disputed that gifts at marriage are regarded as separate acquisitions, and petitioned the Munsif to remit the award, with these opinions, to the arbitrator. The Munsif without declaring that an objection to the legality was apparent on the face of the award remitted the award with the opinions, and requested the arbitrator to consider them, and to return his opinion in writing in a week.

In special appeal the honorable Judges of the Division Bench differed as to whether or not an objection to the legality of the award was apparent on the face of it. The Senior Judge held such an objection was apparent, and that the Munsif was therefore justified in remitting the award for the consideration of the point of law. It is to be observed that the plaintiff did not come into Court alleging that he and the defendants were members of a family. Nor did he allege that the defendants claimed to retain the money as falling into and forming part of the common stock. They were charged with having appropriated the money to their own use, and they denied



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that they had received it, but admitted it had been credited in the books of the firm in which they, the plaintiff, and his father, were jointly interested against a larger sum expended on his marriage. It is to be noticed that, if there had been a question as to whether the moneys received on the plaintiff's marriage formed part of a common stock, or even of the partnership funds, the plaintiff's father should have been made a party to the suit. On the proceedings I do not see that there was an objection to the legality of the award apparent on the face of it. If one partner sues another for moneys recoverable on his account, it would surely be an answer that the moneys so received had been credited against a debt due by him to the firm.

I therefore am of opinion that the Munsif was not justified in remitting the award to the arbitrator. At the same time having perused the evidence it is apparent to me that the questions really in issue were not properly raised by the pleadings; and, moreover, that they are not disposed of by the judgment of the Court below. The parties are members of a family who, while retaining undivided the firm which has descended to them from their common ancestor, have also separate dealings, and I have no doubt that the dispute arises out of the question as to whether or not expenses relating to the plaintiff's marriage ought to be met by the separate property of his father or out of the joint firm. The questions which called for determination in this suit appear to me to be the following: Did the sums received on the occasion of the plaintiff's marriage come to the hands of the defendants: If they did have they been appropriated by the defendants to their own use: for if they have been so appropriated, the defendants are liable, and it is unnecessary to go further: but if the moneys have not been appropriated by the defendants to their own use, but have been carried into the firm, then the question arises whether the defendants were at liberty to set them off against expenses incurred by the firm on the plaintiff's marriage, and before determining this issue, the plaintiff's father should have been made a party to the suit. All proper parties being before the Court, it should then have been inquired whether the joint fund or the separate estate of each of the partners should have been charged with the marriage expenses of the members of the family. Had the parties been members of a Hindu family living altogether

in commensality, I admit that the plaintiff would have been entitled to claim his marriage presents as a separate acquisition, and that the Courts would be justified in applying Hindu law, and I hold further that, in determining whether the joint or separate estate should bear the expenses of the plaintiff's marriage, the Courts are justified in applying Hindu law controlled as it may be by the agreement binding on the members as to the purposes to which the property remaining undivided should be applied. In my judgment the appeal should prevail and be decreed, the claim being dismissed on the ground that the award was a good award, and that a decree should have passed in accordance with it, but if it be held that the award was open to the objection urged, and that the plaintiff was justified in trying the suit on the merits, it is in my judgment necessary for the purposes of justice that such of the issues suggested by me as are undisposed of by the judgment of the Subordinate Judge should be tried, and I would remit them for that purpose.

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SPANKIE, J.—I adhere to my opinion. With regard to the nature of the claim, the statements of the parties, the reference to arbitration, and the award itself, I see no illegality apparent on the face of the award, and therefore it was not one with which the Munsif could interfere under s. 323 of Act VIII of 1859. It may be erroneous in law, but, if so, that error is not apparent on the face of the award, and therefore it cannot be set aside merely because it is erroneous in law.

OLDFIELD, J.—I am of the same opinion in this case as Mr. Justice Spankie. The award was improperly remitted to the reconsideration of the arbitrator, as there was no ground under s. 323 which justified the Munsif to remit it. There was no objection to the legality of the award apparent on the face of the award; the decision was made upon facts in connection with the partnership relations of the parties, and the Munsif in remitting the award does not point out the particular illegality apparent upon the face of the award, nor does he appear to have come to any conclusion that there was an apparent legal defect; he merely remitted it that the arbitrator should consider some objections which the plaintiff alleged against a supposed view of the Hindu law taken by the arbitrator.

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There were no objections taken under s. 324, and under the circumstances the Court should have given judgment according to the award.

*Appeal allowed.*

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March 11.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.*

FAZAL MUHAMMAD (PLAINTIFF) v. PHUL KUAL (DEFENDANT).\*

*Appeal under cl. 10 of the Letters Patent—Computation of Limitation.*

In computing the period of limitation prescribed for an appeal under cl. 10 of the Letters Patent, the time requisite for obtaining a copy of the judgment appealed from cannot be deducted, such copy not being required, under the rules of the Court, to be presented with the memorandum of appeal.

THIS was an appeal to the Full Court, under cl. 10 of the Letters Patent, which had been preferred two days after the period of limitation (1) had expired.

On behalf of the appellant it was contended that the time requisite for obtaining a copy of the judgment appealed from should be deducted, in computing the period of limitation. On behalf of the respondent it was contended that, inasmuch as under the Rules of Practice adopted by the High Court on the 21st May 1873, regarding the admission of appeals under cl. 10 of the Letters Patent, a copy of the judgment appealed from was not required to be presented with the memorandum of appeal (2), the time for obtaining a copy could not be deducted.

The *Senior Government Pleader* (Lala Juala Prasad), *Munshi Hanuman Prasad*, and *Maulvi Mehndi Hasan*, for the appellant.

*Mr. Colvin*, for the respondent.

The Full Bench delivered the following

JUDGMENT.—The Full Bench is of opinion that the appeal is beyond time and not entitled to be admitted. It is therefore dismissed with costs.

\* Appeal under cl. 10, Letters Patent, No. 4 of 1873.

(1) Under the Rules of Practice adopted by the High Court on the 21st May 1873, regarding the admission of appeals under cl. 10 of the Letters Patent, such appeals must be preferred within ninety days, "unless the Court, in its discretion, on

good cause shown, shall grant further time."

(2) Rule iii.—The appellant shall not be required, as in ordinary appeals, to file, with such petition of appeal, a copy of the judgment appealed from.

## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

NIKKA MAL AND OTHERS (PLAINTIFFS) v. SULAIMAN SHEIKH  
GARDNER (DEFENDANT).\*

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March 18.

*Usufructuary Mortgage.*

By the terms of a deed of usufructuary mortgage the mortgagor accepted the liability on account of any addition that might be made to the demand of the Government at the time of settlement. During the currency of the mortgage-tenure the mortgagees, averring that they had had to pay a certain sum in excess of the amount of Government revenue entered in the deed of mortgage from 1279 to 1281 fasli, sued the mortgagor to recover such excess. *Held* that, inasmuch as no settlement of accounts was contemplated or was necessary under the provisions of the deed of mortgage, and such deed did not contain a provision reserving the adjustment of any sums paid by the mortgagees in excess of the amount of the Government demand at the time of the execution of such deed to the time when the mortgage-tenure should be brought to an end, the suit was not premature and could be entertained.

THE facts of this case were as follows: The defendant in this suit, on the 28th May 1869, gave the plaintiffs in this suit a usufructuary mortgage of one moiety of a certain village, and put the plaintiffs into possession. Under the terms of the deed of mortgage the mortgagees agreed to collect rents, to pay the Government revenue, and to take the profits in lieu of interest on the mortgage-money, and the mortgagors were at liberty on the expiry of five years to repay the mortgage-money, and to enter on the property. The deed also contained this condition, *viz.*, "If the Government demand be enhanced or reduced at the time of settlement, I, the mortgagor, am liable for it, and the mortgagees shall have nothing to do with the increase or decrease of the Government demand." The deed also empowered the mortgagees to enhance the rents at any time. The revenue which was payable in respect of the mortgaged property at the time of the execution of the deed of mortgage having been enhanced, and the plaintiffs having paid the enhanced revenue for three years, the plaintiffs brought the present suit to recover from the mortgagor the sum paid by them in excess of the revenue which was payable at the time of the exe-

\* Second Appeal, No. 992 of 1878, from a decree of G. L. Lang, Esq., Judge of Aligarh, dated the 10th June 1878, affirming a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 19th January 1878.

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cution of the deed of mortgage, basing their suit on the condition in the deed of mortgage stated above. The defendant set up as a defence to the suit that on a proper construction of the deed of mortgage the claim of the plaintiffs could not be preferred during the currency of the mortgage, but only when accounts were settled on redemption of the mortgage. The Court of first instance allowed this contention and dismissed the suit, and on appeal by the plaintiffs the lower appellate Court also allowed it.

The plaintiffs appealed to the High Court contending that the lower Courts had improperly construed the deed of mortgage, and they were entitled, under the condition in the deed of mortgage upon which the suit was based, to prefer the present claim.

Pandit *Bishambar Nath* and *Babu Jogendro Nath Chaudhri*, for the appellants.

*Babu Oprokash Chandar*, for the respondent.

The judgment of the Court was delivered by

PEARSON, J.—By the terms of the deed of mortgage, dated 28th May 1869, the mortgagor accepted the liability on account of any addition that might be made to the demand of the Government at the time of settlement. The mortgagees, averring that they have had to pay Rs. 1,907-13-3 in excess of the amount of the Government demand entered in the mortgage-deed from 1279 to 1281 fasli, sue to recover that amount with interest. The lower Courts have disallowed the suit on the ground that the mortgagees are not competent to prefer a claim of this sort in a suit during the currency of the mortgage-tenure. Such a claim, in the opinion of the lower Courts, can only be properly advanced and adjusted when a settlement of accounts between the parties takes place at the termination of the mortgage tenure. One obvious objection to the opinion of the lower Courts on this subject is that no settlement of accounts is contemplated by or is necessary under the provisions of the deed of mortgage, which allows the mortgagees to appropriate the profits realized by them during the terms of mortgage in lieu of interest, and the mortgagor to recover his estate at the end of that term by payment of the principal or the

amount of the loan. Another not less obvious objection is the unreasonableness of expecting the mortgagees to make large payment year after year for the mortgagor to be treated as mere supplements to the original loan. But apart from the objections aforesaid, the view of the lower Courts that a suit of the nature of the present cannot be brought year by year by the mortgagees for the recovery of any sums paid by them in excess of the amount of the Government demand at the time of execution of the deed of mortgage, merely because there is no express provision made for such suit being brought in the deed of mortgage, is quite untenable. The law authorises a man to sue for a debt whenever it becomes due to him. The mortgagees could only have been precluded from so suing, had there been an express provision in the deed reserving the adjustment of such claims to the moment when the mortgage-tenure should be brought to an end. It is admitted that a similar suit has been already once before brought by the mortgagees. It was not then pleaded that the suit was premature and could not be entertained. On the contrary it was entertained and the claim was decreed. The lower appellate Court has remarked that the deed of mortgage has been carelessly drawn up, inasmuch as the mortgagees are authorised to raise the rents, yet no provision is made for the disposal of the increased profits due to their enhancement; although it can hardly be supposed that it was the intention of the mortgagor that she should pay any increase of revenue to Government, and that the mortgagees should enjoy all the corresponding increase of profits consequent on the enhancement of the rents. We observe, however, that in the present case it is no part of the defence that the increased demand of the Government has been met by a corresponding enhancement of rent. On the contrary the plea is that although empowered to enhance the rent, the mortgagees have neglected to do so. There is nothing in the deed of mortgage binding the mortgagees to enhance the rents in the event of the *jama* being enhanced. All that is said is that "if the mortgagees wish to enhance the rent of any tenant, they may enhance it, &c." On the other hand the liability undertaken by the mortgagor to pay any additional demand made by the Government is not limited by any condition that such increased demand cannot

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be met by a corresponding enhancement of rents. In the former suit to which reference has been made it was held that enhancement of rents by the mortgagees would not debar them from recovering enhanced *jama*; and the ruling was not impugned by appeal. The ground on which the suit has been disallowed by the lower Courts failing, it does not appear that there is any substantial defence to the suit, or that in reference to the foregoing remarks it is necessary to remand the case for the trial of the other issues laid down for trial by the Court of first instance.

We decree the appeal and claim with costs in all the Courts, and interest at 6 per cent. per annum from the date of this decree to the date of realisation.

*Appeal allowed.*

1879  
 March 20.

*Before Mr. Justice Pearson and Mr. Justice Spinkie.*

THE COLLECTOR OF MORADABAD (DEFENDANT) v. MUHAMMAD  
 DAIM KHAN (PLAINTIFF).\*

*Act VIII of 1859 (Civil Procedure Code), s. 309—Pauper Suit—Sale in  
 Execution of Decree—Distribution of Sale-Proceeds—Court-Fees—  
 Prerogative of the Crown.*

With a view to recover the amount of Court-fees which *J* would have had to pay had he not been permitted to bring a suit as a pauper, the Government caused certain property belonging to *B*, the defendant in such suit, who had been ordered by the decree in suit to pay such amount, to be attached. This property was subsequently attached by the holder of a decree against *B* which declared a lien on the property created by a bond. The property was sold in the execution of this decree. *Held* that the Government was entitled to be paid first out of the proceeds of such sale the amount of the Court-fees *J* would have had to pay had he not been allowed to sue as a pauper, the principle that the Government takes precedence of all other creditors not being liable to an exception in the case of lien-holders. The decision in *Ganpat Putaya v. The Collector of Kanara* (1) applied in this case.

THE facts of this case were as follows: One Jagan Nath brought a suit as a pauper against Bulaki Das in the Moradabad district, in which suit a decree was made against Bulaki Das directing that he should pay the costs of such suit. The Collector

\* Second Appeal, No. 1060 of 1878, from a decree of Maulvi Muhammad Sami-ul-la Khan, Subordinate Judge of Moradabad, dated the 4th June 1878, reversing a decree of Maulvi Ain-ud-din, Munsif of Moradabad, dated the 19th November 1877.

(1) I. L. R., 1 Bom., 7.

of Moradabad subsequently applied for the attachment of a house belonging to Bulaki Das, with a view to recover by its sale the amount of Court-fees which Jagan Nath would have had to pay had he not been permitted to sue as a pauper. The house was accordingly attached on the 8th January 1875. The house was again attached on the 30th June 1876 in the execution of a decree obtained by Muhammad Daim Khan against Bulaki Das on a bond for the payment of money, in which the house was charged with such payment, such decree directing that the house should be sold in satisfaction of the decree. The house was sold in the execution of this decree, and the Collector was first paid out of the sale proceeds, and the surplus remaining was paid to Muhammad Daim Khan, who now sued the Collector to recover the amount paid to him. The Court of first instance held that the Government was entitled to be paid first out of the sale-proceeds, and dismissed the suit. On appeal by the plaintiff the lower appellate Court gave him a decree, distinguishing the present case from *Ganpat Putaya v. The Collector of Kanara* (1), on the ground that in the present case the plaintiff had a lien on the property.

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COLLECTOR  
OF  
MORADABAD  
v.  
MUHAMMAD  
DAIM KHAN.

The defendant appealed to the High Court, contending that the Government took precedence of creditors of every description.

The *Senior Government Pleader* (Lala Juala Prasad), for the appellant.

Shah Asad Ali, for the respondent.

The judgment of the Court was delivered by

PEARSON, J.—In our opinion the ground of appeal is valid and must be allowed. The Bombay High Court's decision in the case of *Ganpat Putaya v. The Collector of Kanara* (1) appears to be applicable in the present case. The principle that the Government takes precedence of all other creditors is not liable to an exception in the case of lien-holders. We decree the appeal with costs, and, reversing the lower appellate Court's decree, restore that of the Court of first instance.

*Appeal allowed.*

(1) I. L. R., 1 Bom., 7.



1879  
March 24.

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

**BHOLA NATH AND ANOTHER (PLAINTIFFS) v. BALDEO (DEFENDANT).\***  
*Act VIII of 1871 (Registration Act), ss. 18, 50—Act III of 1877 (Registration Act), ss. 17, 18, 50—Registered and unregistered documents.*

A document creating an interest in immoveable property the registration of which under Act VIII of 1871 was compulsory, and which was registered under that Act, does not, under s. 50 of that Act, take effect as regards such property against an unregistered document relating to such land, the registration of which under Act VIII of 1871 was optional (1).

*Held* that the provisions of s. 50 of Act III of 1877 did not apply to documents executed after the first day of July 1871 and before Act III of 1877 came into operation (2).

THE facts of this case were as follows: Certain persons mortgaged their share in a certain village to one Baldewa by a deed dated the 15th August 1872. The registration of this deed under Act VIII of 1871 was not compulsory, and it was not registered. The same persons subsequently again mortgaged such share to one Bhola Nath and a certain other person, by two separate deeds, both dated the 3rd October 1872. The registration of these deeds under Act VIII of 1871 was compulsory, and they were registered. Bhola Nath and his co-mortgagee obtained a decree on these deeds, in execution of which the share was sold on the 23rd October 1876, the mortgagees purchasing the property. Baldewa having obtained a decree on his deed sought to bring the share to sale in execution thereof. On the day fixed for the sale Bhola Nath and his co-mortgagee satisfied Baldewa's decree, and then instituted the present suit against Baldewa and the mortgagors to recover the amount which they had paid on account of Baldewa's decree. The plaintiffs contended, amongst other things, that their deeds of mortgage being registered took effect against the defend-

\* Second Appeal, No. 1050 of 1878, from a decree of Maulvi Muhammad Maqsood Ali Khan, Subordinate Judge of Bareilly, dated the 28th May 1878, affirming a decree of Babu Brij Pal Das, Munsif of Bisanli, dated the 25th March 1878.

(1) So held in *Hamed Bux v. Bindra Bux*, H. C. R., N.-W. P., 1870, p. 37, and *Shaiikh Riasutulla v. Durga Churn Pal*, 15 B. L. R., 294, S. C., 24 W. R., 121, with reference to s. 50 of Act XX of 1866, the provisions of which section and s. 50 of Act VIII of 1871 are similar. See, however, *Shamacharan Neogi v. Nabinchandra Dhoba*, 6 B. L. R., Ap., 1; and *Gayaram Mazumdar v.*

*Madhusudan Mazumdar*, 4 B. L. R., Ap., 73, and the cases cited in that case, which refer to section 68 of Act XVI of 1864.

(2) See, however, *Soodharam Bhuttacharjee v. Obhoy Chunder Bundopadhyaya*, 10 B. L. R., 380, where retrospective effect appears to have been given to s. 50 of Act XX of 1866.

ant's unregistered deed, notwithstanding that the registration of the defendant's deed was optional, in virtue of the provisions of s. 50 of Act III of 1877. The defendant contended that the provisions of that section of Act III of 1877 did not apply to documents executed before the passing of that Act; and that the registration of the plaintiffs' deeds being compulsory, while that of the defendant's deed was optional, there was nothing in Act VIII of 1871 which gave the plaintiffs' deeds preference over the defendant's deed by reason that the plaintiffs' deeds were registered, while the defendant's deed was not registered. The Court of first instance allowed the defendant's contention, and dismissed the plaintiffs' suit. On appeal by the plaintiffs the lower appellate Court affirmed the decree of the Court of first instance.

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The plaintiffs appealed to the High Court contending that s. 50 of Act III of 1877 applied to documents executed before the passing of that Act, and that under that Act their deeds, being registered, took effect against the defendant's unregistered deed.

Pandit *Ajudhia Nath* and Lala *Harkishen Das*, for the appellants.

Pandit *Bishambar Nath*, for the respondent.

The judgment of the Court was delivered by

SPANKIE, J.—Both the bonds were executed in 1872, and as far as the deed of plaintiff, appellant, is affected, the registration law in force at the time of its execution was Act VIII of 1871. By s. 50 every document of the kind mentioned in clauses (a) and (b) of s. 18 shall, if duly registered, take effect as regards the property comprised therein against every other unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. Buts. 18 applies to documents of which the registration is optional. The registration of the deed of plaintiffs was compulsory. We need not interfere. Act III of 1877 does not, we think, apply. The unregistered document in that Act (s. 50) means one not registered under Act VIII of 1871 or that Act, although executed after the 1st July 1871. But still the Act introduces for the first time clauses both of s. 17 and s. 18, by which introduction all

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registered documents take effect henceforth as against unregistered documents of which under the Act the registration is optional, subject of course to the explanation in the section. Whereas s. 50 of Act VIII of 1871 gives a preference to registered documents of the kind mentioned in clauses (a) and (b) of s. 18 over the unregistered document, subject again to the explanation added to the section, so that by Act VIII of 1871 it is only the duly registered documents (though their registration is only optional) which take effect against the unregistered documents. As the documents referred to in this suit were both executed after the 1st July 1871 and before Act III of 1877 came into force, the former Act would seem to apply. We agree with the lower appellate Court that no collusion or fraud between the defendants having been established, and the decree having been passed in favour of the first mortgagee, there was nothing to prevent the sale of the property in execution of that decree. If plaintiffs chose to satisfy the decree for their own purposes, they do not thereby seem to have any legal claim upon defendant, the decree-holder, for a refund of the money so paid by them. We affirm the decree of the lower appellate Court, and dismiss the appeal with costs.

*Appeal dismissed.*

### FULL BENCH.

1879  
 March 25.

*Before Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spinkie, and Mr. Justice Oldfield.*

**SHIMBHU NARAIN SINGH (PLAINTIFF) v. BACHCHA AND ANOTHER (DEFENDANTS).\***

*Act XVIII of 1873 (N.-W. P. Rent Act), s. 95—Determination under cl. (a) of Title—Res judicata.*

*S* applied to the Revenue Court, under cl. (a) of s. 95 of Act XVIII of 1873, for the recovery of the occupancy of certain land, alleging that the occupancy of such land had devolved upon her by inheritance, and that the landholder had wrongfully dispossessed her. The landholder set up as a defence to this application that *S* was not entitled to the occupancy of the land by inheritance, but that she was a trespasser. The Revenue Court determined that *S* was entitled to the occupancy of the land by inheritance, and granted her application. The landholder then sued *S* in the Civil Court for the possession of the land.

\* Appeal under cl. 10, Letters Patent, No. 4 of 1877.

*Held, per PRABSON, J., and TURNER, J., that the question of S's title to the occupancy of the land was, with reference to the decision of the Revenue Court, res judicata and could not again be raised in the Civil Court.*

*Per SPANKIE, J., and OLDFIELD, J., contra.*

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THE facts of this case were as follows: One Bakas Kuari, the recorded occupancy-tenant of certain land, his daughter Sukhia, his grandson Manraj, and his son-in-law Khedu, lived as a joint Hindu family. On the death of Bakas Kuari, Manraj's name was recorded as the tenant of the land, and on the death of Manraj Khedu's name was so recorded. On the death of Khedu the landholder disputed Sukhia's right to the holding, and dispossessed her. She applied to the Revenue Court, under cl. (n), s. 95 of Act XVIII of 1873, to be restored to possession, on the ground that the holding had devolved upon her by inheritance from Khedu, her husband, and that she had been wrongfully dispossessed. The Revenue Court of first instance allowed the application on the ground on which it was made, and its order was affirmed on appeal. The present suit was brought in the Civil Court by the landholder against Sukhia for the possession of the holding, on the ground that the defendant was not entitled to succeed to the same by inheritance, not being the wife of Khedu. The Court of first instance held that the defendant was entitled to succeed to the holding as Khedu's widow, and dismissed the plaintiff's suit. On appeal by the plaintiff the lower appellate Court refused to enter into the merits of the case, holding that the question of the defendant's title to the holding was, with reference to the decision of the Revenue Court, *res judicata*.

The plaintiff preferred an appeal to the High Court, contending that the Revenue Court had not determined the question of the defendant's title, and that, if it had determined that question, the question was not *res judicata*. The Judges composing the Division Court (TURNER, J., and SPANKIE, J.), before which the appeal came for hearing, differed in opinion on the point whether the question of the defendant's title to the land was *res judicata*. The judgments of the Division Court were as follows:

TURNER, J.—The respondent, complaining that she had been illegally ousted from an occupancy holding that had devolved on

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her by inheritance, applied to the Revenue Court, under s. 95 of Act XVIII of 1873, to be restored to possession. Her application was granted. It was competent to the zamindar on the hearing of the application to contend that the respondent was a trespasser and had no title. The question was raised and decided rightly or wrongly. The zamindar now sues to be maintained in possession of the holding. The respondent pleaded the order she has obtained from the Revenue Court; that order in my judgment is a conclusive answer to the suit. The Legislature having been pleased to declare that no Civil Court shall take cognizance of any dispute or matter on which an application might be made of the nature mentioned in s. 95, we are unable to review the order passed on such an application in a civil suit; as between the landlord and tenant it is final.

The appeal therefore fails, and the decree of the lower appellate Court must be affirmed with costs.

SPANKIE, J.—Assuming that the original defendant, now represented by Bachcha and Jhingari Kuari, made an application to the Revenue Court, under cl. (n), s. 95 of Act XVIII of 1873, for the recovery of the occupancy of the land from which she had been wrongfully dispossessed, I cannot hold that the order of the Revenue Court on that application would be a bar to the determination of the plaintiff's claim in this suit. I apprehend that "wrongfully dispossessed" means "wrongfully dispossessed" because the landholder had not proceeded in accordance with the provisions of the Rent Act. If that were the case, the Collector could restore her to possession. But he was not at liberty on that application to determine finally whether or not the plaintiff here, as the landholder, had the right to recover the cultivatory possession of the land, on the ground that the occupancy right had lapsed on failure of heirs to the late occupier. The landholder, who denies that defendant was his tenant, was unable to obtain relief from the Revenue Court either under s. 93 or s. 95. In my opinion therefore this was a suit of which the Civil Court not only could take cognizance (and this the lower Courts admit), but that the determination of the issues involved in the case was not barred by the order of the Revenue Court on the application of the original

defendant. The lower appellate Court should have tried the appeal on the merits.

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The plaintiff appealed to the Full Bench, under cl. 10 of the Letters Patent, from the judgment of Turner, J.

The *Senior Government Pleader* (Lala Juala Prasad) and *Munshi Hanuman Prasad*, for the appellant.

Lala Latta Prasad, for the respondents.

The following judgments were delivered by the Full Bench :

PEARSON, J.—I am not very well able to reconcile the first and last grounds of the appeal. In the first it is contended that no question of title by right of succession was directly at issue. In the last it is admitted that the point for determination was whether the last tenant had left an heir who could legally claim a right of possession of the land. The real question raised, tried and decided in the application made by Mussamat Sukhia in the Revenue Court, under cl. (n), s. 95 of Act XVIII of 1873, was whether she was Khedu Kuari's widow and heir. Such she claimed to be, and because as such she was entitled to retain his holding, she alleged her dispossession by Raja Shimbhu Narain Singh to have been wrongful. Her claim rested on no other ground, and if the Revenue Court was not competent to determine the question whether she had or had not a right to the holding by inheritance from her husband, it could not have disposed of her application. But an application such as she made can only, under the provisions of s. 95 of Act XVIII of 1873, be entertained by Courts of Revenue, and no other Courts can take cognizance of any dispute or matter on which such an application might be made. The decision is *res judicata* and is not open to re-adjudication in the present suit. The provisions of s. 95 seem to be opposed to and to preclude the view that, when questions of right are determined on applications made thereunder, the decisions of the Revenue Courts are not final and may be challenged in the Civil Courts.

I would therefore affirm the decision of the Division Bench, and dismiss the appeal with costs.

SPANKIE, J.—Since the hearing of this case, I desire to add that I retain the opinion which I expressed when the case was

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before the Division Bench. It appears to me that the Full Bench decision of the Presidency High Court in *Guru Das Roy v. Ram Narain Mitter* (1) is very much in point. The same principle must apply to this case.

OLDFIELD, J.—The plaintiff sues in the suit before us to eject the defendant from the land in suit as a trespasser. The defendant alleges she is the widow of a former tenant, and has a right to succeed to the tenancy as his heir, and it appears she has already made an application in the Revenue Court to recover possession of the holding. She then alleged that the plaintiff had permitted her to take possession and recognised her tenancy and had subsequently dispossessed her. In that matter her right of succession as heir, and the fact that she had been recognised as a tenant and so succeeded to the holding, were disputed. The Assistant Collector before whom the case came inquired into and decided that she had a right of succession, and that she had taken possession of the holding on the death of her husband, and that plaintiff had given a lease of the holding to others, but he did not decide whether plaintiff had ever recognised her tenancy, and on this finding he allowed her application for recovery of possession. The question before us is whether the suit now brought is cognizable by a Civil Court, and whether the decision of the Revenue Court is final.

I cannot see how the matter in dispute in this suit can be otherwise than cognizable by the Civil Court, for it is certainly not a matter on which an application could be made by the plaintiff in the Revenue Court under s. 95 of Act XVIII of 1873. This is no recognised tenancy, but the question at issue is whether defendant is a tenant or trespasser, whether she has a right or not to succeed as heir to the former tenant. This is a question peculiarly within the province of a Civil Court to determine. Nor can I consider that a decision of a Revenue Court which may have been passed on such a point in the course of deciding an application preferred under s. 95, clause (a), Act XVIII of 1873, will be binding as a final decision of a competent Court. I concur with Mr. Justice Spankie in the view he takes. The jurisdiction of the Revenue Court in the matter of an application

(1) 7 W. R., 186.

under clause (n), s. 95 of Act XVIII of 1873, is I think confined to the determination of the immediate matter of the application, the dispossession otherwise than by law of the tenant,—see *Khugowlee Singh v. Hossein Bux Khan* (1). It seems to me that it was not intended to give the Revenue Court when disposing of such applications a jurisdiction to decide finally questions of title or succession under Hindu law. The Act seems to recognise a distinction between suits and applications, for the former are alone provided by the Act with a regular procedure under chapter vi. In the former also the decisions on questions of title would come before the Civil Court by way of appeal, whereas there is no appeal to a Civil Court in the latter. These are considerations which may make one hesitate in holding that it was intended that decisions should be final on matters outside the immediate object of the application and otherwise peculiarly cognizable by Civil Courts.

The appeal should be tried by the lower appellate Court on the merits.

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*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson,  
Mr. Justice Spankie, and Mr. Justice Oldfield.*

1879  
March 27.

IN THE MATTER OF THE PETITION OF GUR DAYAL.

*Act X of 1872 (Code of Criminal Procedure), s. 468—Sanction to prosecute—  
Relative positions of a Magistrate of the First Class, the Magistrate of  
the District, and the Court of Session.*

*Held* (OLDFIELD, J., dissenting) that, for the purposes of s. 468 of Act X of 1872, a Magistrate of the First Class is subordinate to the Magistrate of the District, and consequently application for sanction to prosecute a person for intentionally giving false evidence before the former may, where such sanction is refused by the former, be made to the latter, and not to the Court of Session, which has not power to give such sanction.

THIS was an application to the High Court for the exercise of its power of revision under s. 297 of Act X of 1872. One Gur Dayal was tried at Allahabad by Mr E. White, a Magistrate of the First Class, on a charge of dishonestly receiving stolen property, an offence punishable under s. 411 of the Indian Penal Code, and on the 8th August 1878 was acquitted by the Magistrate. Gur Dayal

(1) 7 B. L. R., at p. 679.



1879 subsequently applied to the Magistrate, under s. 468 of Act X of 1872 for sanction to prosecute one Hira Lal and certain other persons, who had given evidence against him in the Magistrate's Court, for making a false charge against him, and giving false evidence, offences punishable under ss. 193 and 211 of the Indian Penal Code. The Magistrate refused to grant such sanction. Gur Dayal then applied to Mr. H. A. Harrison, Sessions Judge of Allahabad, for sanction, and on the 15th August 1878 the Sessions Judge granted the required sanction. On the 24th August 1878 the Sessions Judge, having noticed the case of *Imperatrix v. Padmanabh Pai* (1), cancelled the permission to prosecute previously granted on the ground that Mr. White was subordinate to the Magistrate of the District and not to the Court of Session within the meaning of s. 468 of Act X of 1872, and the application for sanction to prosecute must be made to the Magistrate of the District.

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Gur Dayal now applied to the High Court to revise the order of the Sessions Judge dated the 24th August 1878. The Court (Oldfield, J.) referred to the Full Bench the question whether the Sessions Judge had power, under s. 468 of Act X of 1872, to sanction the prosecution demanded by the petitioner.

Mr. L. Dillon, for the petitioner, contended that the Court of a Magistrate of the First Class is "subordinate" to the Court of Session, for the purposes of s. 468 of the Criminal Procedure Code. S. 468 should be read by itself and not with s. 37. These sections provide for different matters. S. 468 contains provisions of a judicial nature, while the nature of the provisions in s. 37 is executive. S. 37 cannot govern s. 468.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown, contended that s. 37 of the Criminal Code governed s. 468, and the Court of Session in this case had no power to sanction the prosecution demanded.

STUART, O.J.—In the present case Gur Dayal, the applicant to us in revision, had been charged and tried before the Joint Magistrate of the First Class under s. 411 of the Indian Penal Code and s. 505 of the Criminal Procedure Code as an alleged receiver of stolen

(1) I. L. R., 2 Bom. 384.,

property. The evidence against him consisted chiefly of statements made by four *dallals*, residents of Allahabad, but these were considered so suspicious and untrustworthy that the Magistrate dismissed the case. Gur Dayal then applied to the Sessions Judge under s. 468 of the Criminal Procedure Code for permission to prosecute the *dallals* for giving false evidence under ss. 193 and 211 of the Indian Penal Code, and such sanction the Judge gave by an order dated the 15th August 1878. Subsequently, on a decision by a Division Bench of the High Court of Bombay, Melvill and Pinhey, JJ., being brought to his notice, by which it was ruled that the Magistrate of the District, and not the Sessions Judge, had the power to give the sanction contemplated by s. 468 of the Criminal Procedure Code, he recalled his order and cancelled the sanction he had given; and, in my opinion, he clearly had power to do this.

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The same question arises in this Court in a revision case before Mr. Justice Oldfield, who has referred the matter to a Full Bench, and we are now, after argument at the Bar, to decide the question.

I generally concur in the ruling of the High Court of Bombay. To my mind it is unnecessary to make a nice examination of the Criminal Procedure Code for the purpose of ascertaining the relative position and powers of the different judicial officers in particular cases and in particular circumstances, for it is clear to me that the present case must be disposed of by the construction to be put upon s. 468 read with s. 37 of the Criminal Procedure Code; and with reference to the latter section I do not appreciate the distinction which was taken at the hearing between the Magistrate as an executive and the Magistrate as a judicial officer. No doubt s. 468 contemplates a purely judicial proceeding, but that view of the matter is, in my opinion, not only not inconsistent with s. 37, but that section helps us to interpret s. 468, by providing as it does that all Magistrates shall be subordinate to the Magistrate of the District. The word "subordinate" it will be observed is not in any way limited or qualified, but applies to the jurisdiction of the Magistrate of the District in all its plenitude, and with reference to all that officer's duties and powers, judicial as well as executive. Indeed s. 37 would have been of little value if it had

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to be read as only applying to the executive functions of Magistrates. This view of the section is made still more clear by the express provision that neither the Magistrate of the District nor the Subordinate Magistrates shall be subordinate to the Judge except to the extent and in the manner provided by the Act, and the power to sanction a prosecution for perjury committed before a Magistrate of any of the three classes is clearly not within such an exception. In fact it appears to me that for the purpose of applying s. 468 to such a case as that now before us, the term "Magistrate" in s. 37 and that of "Court" in s. 468 are convertible and have the same meaning ; and—although I do not attach so much importance and force to interpretation clauses in Acts of the Legislature as is sometimes claimed for them, holding that they should not be read merely by themselves, but that they may be controlled and limited by other express provisions of the same law, and as a consequence, that if inconsistent with and repugnant to such other provisions they may be disregarded—yet they frequently are very useful, and in the present case we ought not to ignore the definition of "Criminal Court" in s. 4 of the Criminal Procedure Code, which considered in connection with the two other sections of the same Code I have remarked on, *viz*, ss. 468 and 37, places the true view of the question now to be decided beyond any reasonable doubt.

My answer therefore to the question referred to us is that the Sessions Judge had no power to sanction the prosecution of Hira Lal and others, but that such sanction should have been sought at the hands of the Magistrate of the District.

PEARSON, J.—Magistrates and Sessions Judges are included in the term "Criminal Courts" defined in s. 4 of the Procedure Code. It is impossible to suppose that the Sessions Judge mentioned in s. 37 does not mean the Sessions Court, or that what is said about the subordinate Magistrates refers to them not as Criminal Courts, but only when engaged otherwise than in judicial proceedings. The Procedure Code regulates the procedure of Courts of Criminal Judicature. S. 468 must, in my opinion, be read and interpreted with reference to s. 37 ; and thus it appears that the Court of a subordinate Magistrate is subordinate to the Court of the Magistrate of the District in the matter to which s. 468 relates, unless

the Procedure Code has provided that in that matter subordinate Magistrates shall be subordinate to the Sessions Judge. No such provision has been made. My answer to the question referred to the Full Bench is therefore in the negative.

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SPANKIE, J.—We are asked by the Judge making the reference whether the Sessions Judge has power, under s. 468 of Act X of 1872, to sanction a prosecution, under ss. 211 and 193 of the Indian Penal Code, in the particular case giving rise to the reference.

An Assistant Magistrate of the First Class refused permission to an acquitted person to prosecute the complainant against him under the sections cited above. The party desirous to proceed criminally against the original complainant applied to the Sessions Judge for sanction to do so. The Sessions Judge gave permission, but subsequently recalled it, holding that “when sanction to prosecute has been refused by a Magistrate subordinate to a Magistrate of the First Class, an application to prosecute may be made to the Magistrate of the District, but cannot be made to the Sessions Judge.”

Under the terms of s. 468 of the Criminal Procedure Code, the sanction of the Court, Civil or Criminal, before or against which the offence was committed or “of some other Court to which such Court is subordinate,” is necessary. A “Criminal Court” means and includes every Judge or Magistrate, or body of Judges or Magistrates, inquiring into or trying any criminal case or engaged in any judicial proceeding—s. 4 of Act X of 1872;—and there are four grades of Criminal Courts in British India, *viz.*, (i) The Court of the Magistrate of the Third Class; (ii) The Court of the Magistrate of the Second Class; (iii) The Court of the Magistrate of the First Class; (iv) The Court of Session;—s. 5 of Act X of 1872. In every District, however, there must be a Magistrate of the First Class appointed by the Local Government who is called the Magistrate of the District, and he is to exercise throughout his district all the powers of a Magistrate,—s. 35 of Act X of 1872. Besides the Magistrate of the District, the Local Government may appoint as many other persons as it thinks fit to be Magistrates of the First, Second, or Third Class in the District,—s. 37. of Act X of 1872. Thus all these Magistrates so appointed, when inquiring into or trying any criminal case or engaged in any judicial

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proceeding, are presiding over a Criminal Court. But all these Magistrates are made subordinate to the Magistrate of the District, but neither the Magistrate of the District nor the Subordinate Magistrates are made subordinate to the Sessions Judge, except to the extent and in the manner provided by the Act,—s. 37 of Act X of 1872. It is contended that s. 37 of the Act refers only to the subordination of Magistrates to the District Magistrate in their executive capacity, that such subordination is not of a judicial character, and that a Magistrate of the First Class is not subordinate to the Court of the Magistrate of the District, but to the Court to which appeals from the decisions of the Magistrates of the First Class ordinarily lie, namely, the Court of Session. But s. 37 makes no provision subordinating Magistrates to the District Magistrates solely in their executive capacity, though it does limit the subordination both of the District Magistrate and Subordinate Magistrates to the Sessions Judge to the extent and in the manner provided by the Act. When we consider what is the extent of the subordination to the Sessions Judge provided by the Act, it appears chiefly to be limited to cases committed for trial to the Sessions Court, to cases coming regularly before the Sessions Judge in appeal, and to those instances in which, under s. 295 of Act X of 1872, he may at all times call for and examine the record of any Court subordinate to himself as a Court for the purpose of satisfying himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such subordinate Court. In some other respects, however, hereafter to be mentioned, the Magistrates are subordinate to the Sessions Judge. It is, however, worthy of notice that a Magistrate of the District has the same power by s. 295 as the Court of Session has over the Courts of the subordinate Magistrates. “Any Court of Session or Magistrate of the District may call for and examine the record of any Court subordinate to such Court or Magistrate for the purpose, &c., &c., &c.” Here there is a distinct recognition of the subordination of Courts of Magistrates to the Magistrate of the District for a judicial purpose, that of ascertaining whether there are any grounds for revision, and for the purposes of this particular section every Magistrate in a Sessions Division is to be deemed subordinate to the Sessions Judge of the Division. This is an illustration of the subordination of the Magistrate

of the District and of Subordinate Magistrates to the Sessions Judge as provided by the Act. I have used the words "judicial purpose," that of ascertaining whether there are any grounds for revision, because under s. 296 both Sessions Judge and District Magistrate are called upon to exercise their judgment, and if they think that the judgment sent for under s. 295 is contrary to law, or that the punishment is too severe, or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court. By the second clause, in Sessions cases, if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial. This illustrates the manner in which the Sessions Court or District Magistrate is to deal with the Subordinate Magistrate. So again by s. 298 as amended by s. 31 of Act XI of 1874, the Court of Sessions may direct the Magistrate of the District by himself, or any Magistrate subordinate to him, or the Magistrate of the District may direct any subordinate to make further inquiry into any complaint which has been dismissed under s. 147. Here the extent of subordination is clearly laid down, and it will be observed that, when the Magistrate of the District acts under this section, his authority extends to a Magistrate of the First Class. Those parts of the Code which deal with commitments to a Court of Session and to appeals sufficiently show to what extent the Courts of the Magistrates are subordinate to the Sessions Judge in respect of the cases which come before him as a Court of Session or Judge of appeals, and do not require further consideration. But the Act provides for the subordination of the Magistrates to the Sessions Judge in some other cases, as for instance the Sessions Judge can in any case, whether there be an appeal on conviction or not, direct that an accused person may be admitted to bail, or that the bail required by a Magistrate be reduced—s. 390 of Act X of 1872. He can also order or refuse a commission for the examination of a witness in cases under trial by a Magistrate—s. 330 of Act X of 1872. On the other hand s. 328 appears to give the Magistrate of the District considerable power over all Magistrates subordinate to him, even to the extent of ordering a new trial where a conviction has passed upon evi-

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dence not wholly recorded by the Magistrate before whom the conviction was had, if he is of opinion that the accused person had been materially prejudiced thereby—s. 328 of Act X of 1872. Under this section a Court of Appeal, and the District Magistrate, both are superior Courts to those of the Magistrate. The District Magistrate may also hear an appeal against the order of a Magistrate of the First Class requiring security for good behaviour—s. 267 of Act X of 1872.

It will be thus seen that the Magistrates of the First Class are to some extent judicially subordinate to the Magistrate of the District, as also to the Sessions Judge. But it is nowhere laid down that the Magistrate of the First Class is to be subordinate to the Magistrate of the District only so far as is provided by the Act, whereas neither the Magistrate of the district, nor the Subordinate Magistrate, are subordinate to the Sessions Judge "except to the extent and manner provided by the Act,"—s. 37. It would seem therefore that the words "all such Magistrates shall be subordinate to the Magistrate of the District" do not point exclusively to Magistrates in their executive, but also apply to them in their judicial character, except so far as the Act makes them subordinate to the Sessions Judge. It has been contended that the test as to the nature of the subordination of a Magistrate of the First Class to the Sessions Judge or Magistrate of the District lies in the answer to the following question,—To whom does an appeal lie from the Magistrate's decision? But this is, as we have seen, not the conclusive test. The true test is to be found in the words "except to the extent and manner provided by the Act." It is not provided in s. 468 that application is to be made to the Court of Session or to the High Court, but the words used are "except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate." Nor has the Act provided in this section, or anywhere else, that in respect of an application of the nature contemplated by s. 468 the Magistrate's Court is subordinate to that of the Sessions Judge, and therefore his interference would appear to be barred under the proviso in s. 37 of the Act. The Magistrate of the First Class, it is urged, has the same powers as the Magistrate of the District has, and therefore the

latter acting as a Criminal Court within the terms of s. 4 is not a Criminal Court superior to that of the former, who therefore cannot be said to be subordinate to it in the sense required by s. 468. But the Magistrate of the District is specially appointed as such by the Government, and he exercises throughout his District all the powers of a Magistrate—s. 35 of Act X of 1872—and he does so although the District may have been divided into divisions—s. 40 of Act X of 1872. A Magistrate of the First or Second Class may be placed in charge of a Division of a District, and the officer so appointed exercises the powers conferred upon him under the Act, or under any law for the time being in force, “subject to the control of the Magistrate of the District”—s. 46 of Act X of 1872. The Government may also delegate its own powers of placing these Magistrates in Divisions of a District to the Magistrate of the District. Again, every Magistrate in a Division of a District is subordinate to the Magistrate of the Division of the District, subject, however, to the general control of the Magistrate of the District—s. 41 of Act X of 1872—so that throughout his District the subordination of all Magistrates to the Magistrate of the District is clearly provided for both in his executive and judicial character, except when the Magistrates are made by the Act subordinate to the Sessions Court. Whenever then the Magistrate of the District is engaged in any judicial proceeding, although he may not have larger powers in respect to the trial of offences and to passing sentences on persons convicted of them than a Magistrate of the First Class has, his Court is a Criminal Court to which the Courts of the Magistrates, except where they are made subordinate to the Sessions Judge, under the proviso of s. 37, are subordinate. Some doubt was expressed whether the entertainment of an application under s. 468 could be regarded as part of a judicial proceeding. But a judicial proceeding as defined in s. 4 includes any proceeding in the course of which evidence is or may be taken, and it cannot be denied that any Court to whom “a complaint” (in the words of s. 468) of an offence against public justice is made, would be at liberty, if it pleased, to examine the complainant, and even take evidence if it thought that there was any necessity to do so, in order to enable the Court to determine whether or not sanction should be given. There can therefore be no doubt that any Magistrate or Sessions Judge engaged

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In conclusion, I would say, in reply to the question, that the Sessions Judge had not power, under s. 468, to sanction the prosecution of Hira Lal and others, demanded by Gur Dayal for offences punishable under ss. 211 and 198 of the Indian Penal Code.

OLDFIELD, J.—The question is whether the Court of a Magistrate of the First Class is a Criminal Court subordinate to the Court of Session, within the meaning of s. 468 of the Criminal Procedure Code, so as to enable the Sessions Court to give sanction to entertain a complaint of an offence against public justice committed before or against the Magistrate's Court. By s. 37 of the Code Magistrates are not subordinate to the Sessions Judge except to the extent and in the manner provided by the Criminal Procedure Code, and it is argued that, with reference to this section, the Magistrate's Court cannot be held to be subordinate to the Sessions Court for the purposes of s. 468, there being no provision making the Magistrate subordinate for the purposes of that section.

But it is to be noticed that the word used in s. 468 is not Magistrate but Criminal Court, the sanction is required of the Court to which the Criminal Court is subordinate before which the offence is committed, not of the Sessions Judge to whom the Magistrate is subordinate. The argument proceeds on the supposition that the term Magistrate in s. 37 and Criminal Court in s. 468 are used indiscriminately, but s. 4 of the Code contains a special definition of the term Criminal Court. It is something more than Magistrate. "Criminal Court" means and includes every Judge or Magistrate, or body

of Judges or Magistrates, inquiring into or trying any criminal case or engaged in any judicial proceeding. When we find a special definition of the term Criminal Court, I think it is putting a strained meaning on the term Magistrate in s. 37 to say that it extends so as to include Criminal Courts. A Criminal Court may mean and include a Magistrate, but the term Magistrate will not necessarily mean and include a Criminal Court. If s. 37 had been dealing with the subordination of Criminal Courts, it is reasonable to suppose that the words Criminal Courts would have been used instead of Magistrate. The distinction is one which the Code itself draws, and is important, for while s. 37 limits the subordination of Magistrates to Sessions Judges, there is nothing in the Code to the effect that the Court of the Magistrate of the First Class is not subordinate to the Court of the Sessions Judge, but on the contrary its subordination as a Criminal Court, that is, where a Magistrate is acting judicially, seems contemplated and enforced by the provisions of the Code, for instance, by the appellate jurisdiction of the Sessions Court over Magistrates' Courts, and more particularly by the powers conferred on the Court of Session over the Courts of Magistrates by ss. 295 and 296. This establishment of a power of supervision and revision seems to me in itself to constitute a subordination, within the meaning of s. 468. S. 37 may be dealing with the subordination of Magistrates personally and executively, and not with Criminal Courts. I do not think we need consider it in interpreting s. 468, which deals with the subordination of Criminal Courts, but be this as it may, as I have already remarked, it seems to me that the intention and effect of ss. 295 and 296 are to constitute the subordination to the Sessions Court of the Magistrates' Courts; which thereby become subordinate Criminal Courts within the meaning of that term in s. 468. I think we have in s. 419 an indication of what is intended to constitute subordination of Criminal Courts. That section is dealing with orders passed by Criminal Courts for disposal of property and runs: "Any Court of Appeal, Reference, or Revision, may direct any such order passed by a Court subordinate thereto to be stayed, and may modify, alter or annul it." The use here of the words subordinate Court seems to show that Courts over which Courts of Appeal, Reference, and Revision are appointed, are subordinate to the latter in the meaning of the term as used in

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1879 the Code. This subordination will not of course enable the Sessions Court to exercise any powers over the Magistrate's Court other than those allowed by the Code. The learned Judges who decided *Imperatrix v. Padmanabh Pai* (1), and who have taken a contrary view to the one I have expressed, seem to consider that the Legislature intended that the sanction contemplated should be given by the Court before which the offence was committed or by the Appellate Court or the High Court, in fact that the Legislature intended to recognise a subordination of the Magistrates' Courts to the Sessions Court, within the meaning of s. 468; but they consider that, in face of the express provisions in s. 37 applied to s. 468, they cannot give effect to a possible intention of the Legislature. For my part, I think that the law as it stands and the intention of the Legislature are not irreconcilable.

My answer to the reference is that the Sessions Court has power under s. 468 to sanction the prosecution.

## APPELLATE CIVIL.

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March 27.

*Before Mr. Justice Pearson and Mr. Justice Spinkis.*

AHMAD BAKHSH (DEFENDANT) v. GOBINDI (PLAINTIFF).\*

*Act VIII of 1871 (Registration Act), s. 17—Mortgage—Registration.*

The obligors of a bond for the payment of money charging land agreed to pay the principal amount, Rs. 99, within six months after the execution of the bond, and to pay interest every month on the principal amount at the rate of two per cent., and that, in the event of default of payment of the interest in any month, the whole amount mentioned in the bond should become due at once. There was no stipulation preventing the obligors from repaying the loan at any time within the six months after which it was reclaimable. *Held* that the only amount certainly secured by the bond was the principal, and the bond did not therefore need to be registered (2).

THE facts of this case were as follows: In 1871 certain persons gave the plaintiff in this suit a bond for the payment of Rs. 75 by

\* Second Appeal, No. 1078 of 1879, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Agra, dated the 26th July 1878, affirming a decree of Rai Bansi Dhar, Munsif of Agra, dated the 8th June 1878.

(1) I. L. R., 2 Bom., 384.

(2) See also *Karan Singh v. Ram Lal*, I. L. R., 2 All., 96, where it was held that a bond for Rs. 88-3-0 pay-

able on demand with interest did not certainly secure Rs. 100, and its registration was therefore optional.

instalments, without interest, within five years, which bond charged certain land with such payment. This bond did not need to be and was not registered. On the 11th Januray 1874 the same persons gave Ahmad Bakhsh, the defendant in this suit, a bond for the payment of Rs. 99. In this bond, which was registered, the obligors agreed to pay the principal amount within six months from the date of the execution of the bond. They also agreed therein to pay interest on the principal amount every month at the rate of two per cent., and that if they failed to pay such interest in any month, the obligee should be at liberty to sue to recover "the entire amount mentioned in the bond," and they charged the same land with the payment of "the amount mentioned in the bond." On the 7th August 1874 Ahmad Bakhsh obtained a decree on his bond which declared his lien on the land; and on the 24th November 1876 the plaintiff in this suit obtained a decree on his bond declaring his lien on the land. On the 26th December 1876 the land was attached in the execution of Ahmad Bakhsh's decree, and on the 15th April 1877 it was attached in the execution of the decree of the plaintiff in this suit. On the 20th April 1877 the land was sold by auction in the execution of these decrees, and was purchased by the plaintiff in this suit. The Court executing the decrees directed that the sale-proceeds should be paid to Ahmad Bakhsh as the creditor who had first attached the land. The present suit was brought by the plaintiff against Ahmad Bakhsh to recover the money so paid to him. The Court of first instance gave the plaintiff a decree, which the lower appellate Court, on appeal by the defendant, affirmed, holding, *inter alia*, that the registration of the defendant's bond was compulsory, and that consequently the fact that it was registered did not give it preference over the plaintiff's bond the registration of which was optional.

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The defendant appealed to the High Court.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Parshad* and Mir *Zahur Husain*, for the respondent.

The judgment of the Court was delivered by

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PEARSON, J.—In the bond executed in favour of the defendant, appellant, there was no stipulation preventing the debtor from repaying the loan advanced to him at any time within the six months after which it was reclaimable. This being so, it cannot be said that any portion of the interest accruing on the principal was secured for certain, in the sense that it could be definitively calculated and taken into account at the date of the execution of the deed. The only amount certainly secured was the principal which was below Rs. 100. The bond did not therefore need to be registered; but having been registered is entitled to take effect against the unregistered bond executed in the plaintiff's favour. The property was moreover first attached by the defendant, appellant, who, for that reason as well as because his bond is registered, is entitled to preference over the plaintiff, respondent. We accordingly decree the appeal with costs of all Courts, reversing the decree of the lower Courts, and dismiss the suit.

*Appeal allowed.*

### FULL BENCH.

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March 28.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson,  
Mr. Justice Spinkie, and Mr. Justice Oldfield.*

#### EMPRESS OF INDIA v. SARMUKH SINGH.

*Act XI of 1872 (The Foreign Jurisdiction and Extradition Act), ss. 3, 9—Liability of Native Indian British Subject for offence committed in Cyprus—"Native State"—Act V of 1869 (Indian Articles of War), Articles 170, 171—Reference—Confirmation of Sentence of Death—Act X of 1872 (Criminal Procedure Code), ss. 288, 297—Division Court—Full Court.*

*Held* (STUART, C.J., dissenting) that a Native Indian subject of Her Majesty, being a soldier in Her Majesty's Indian army, who committed a murder in Cyprus while on service in such army, and who was accused of such offence at Agra, might, under s. 9 of Act XI of 1872, be dealt with in respect of such offence by the Criminal Courts at Agra, Cyprus being a "Native State," in reference to Native Indian subjects of Her Majesty, within the meaning of that Act (1).

*Per* STUART, C.J.—The power of the Governor-General of India in Council to make laws for the trial and punishment in British India of offences committed by British Indian subjects in British territories other than British India discussed.

(1) As to the power of the Governor-General in Council to legislate for Native Indian subjects of Her

Majesty, see 32 and 33 Vic., c. 28 ss. 1 and 2.

A Division Court of the High Court ordered the Magistrate who had refused to inquire into a charge of murder on the ground that he had no jurisdiction to inquire into such charge, considering that the Magistrate had jurisdiction to make such inquiry. The Magistrate inquired into the charge and committed the accused person for trial. The Court of Session convicted the accused person on the charge and sentenced him to death. The proceedings of the Court of Session having being referred to the High Court for confirmation of the sentence, the case came before the Full Court.

*Held per* STUART, C.J., SPANKIE, J., and OLDFIELD, J., that, in determining whether such sentence should be confirmed, the Full Court was not precluded by the order of the Division Court from considering whether the accused person had been convicted by a Court of competent jurisdiction.

SARMUKH SINGH was a soldier in Her Majesty's Indian Army, and on the 21st August 1878 was serving with his regiment in the Island of Cyprus. In December 1878 his regiment having returned to India and being then stationed at Agra, Srmukh Singh was charged before the Cantonment Magistrate of Agra with having, on the 21st August 1878 at Baffo, Cyprus, murdered one Dewa Singh, another soldier. The Cantonment Magistrate refused to inquire into this charge, on the ground that he could not take cognizance of an offence committed in Cyprus. An application was then made to the High Court on behalf of the Local Government, under s. 297 of Act X of 1872, praying that the Cantonment Magistrate might be ordered to inquire into the charge. The High Court (PEARSON, J., and TURNER, J.), on the 24th January 1879, made an order directing the Cantonment Magistrate to inquire into the charge on the following terms :

“The ninth section of Act XI of 1872, the Foreign Jurisdiction and Extradition Act, declares that all British subjects, European and Native, in British India, may be dealt with in respect of offences committed by them in any Native State as if such offences had been committed in any place within British India in which any such subject may be or may be found, and in s. 3 of the Act the term ‘Native State’ is defined as meaning, in reference to Native Indian subjects of Her Majesty, all places without and beyond the Indian territories under the dominion of Her Majesty. Cyprus is a place without and beyond the Indian territories under Her Majesty's dominion, and is therefore a Native State as defined in that Act. Consequently the prisoner being in the Agra Cantonment

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may be dealt with in respect of the offence it is alleged he has committed in Cyprus as if such offence had been committed in the Agra Cantonment. The Indian Articles of War are not inconsistent with the provisions of the Foreign Jurisdiction Act to which we have referred. Although the titles of Articles 170 and 171 are inaccurate, the former declares that any person subject to the Articles who, at any place in British India within the jurisdiction of any Court of Criminal Justice established by Her Majesty, or by the Government of India, &c., is accused of any offence against the Indian Penal Code, and not included in the foregoing Articles, shall be delivered over to the nearest Magistrate to be proceeded against according to law; and Article 171 declares that such offences, when committed by any person amenable to the Articles, shall in any place out of British India be cognizable by a General Court Martial. The prisoner is accused in British India within the jurisdiction of Courts of Criminal Justice established by the Local Government; he must be delivered to those for trial, the offence of which he is accused not being included in the Articles which precede Article 170. The Magistrate is directed to hold an inquiry and to proceed according to law. The prisoner, a sepoy in the 13th Native Infantry, was accused of having committed murder in the Island of Cyprus, and was in custody under that charge in the Cantonment of Agra. The military authorities desired that an inquiry into the charge should be made by the Cantonment Magistrate, and for that purpose the prisoner was sent to the Cantonment Magistrate's Court and a charge preferred. The Cantonment Magistrate has declined to hold an inquiry on the ground that he has no jurisdiction. We may observe in passing that no record of the proceedings was framed by the Cantonment Magistrate. This should have been done and the grounds stated on which the Magistrate arrived at the conclusion that the charge was not cognizable by him. The Government has applied to this Court to order the Magistrate to inquire into the charge, and in our judgment it is entitled to the order."

In pursuance of this order the Cantonment Magistrate inquired into the charge and committed Sarmukh Singh to the Court of Session for trial on it. He was tried by Mr. H. G. Keene, Sessions Judge of Agra, and was found guilty, the assessors concurring, and was sentenced to death.

Sarmuk Singh appealed to the High Court on the ground that the Sessions Judge had no jurisdiction to try him for an offence committed in Cyprus. The appeal came on for hearing before the Full Court.

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Pandit *Ajudhia Nath*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The *Junior Government Pleader*.—The order dated the 24th January last, made under s. 297 of Act X of 1872, decides that the Criminal Courts at Agra had jurisdiction. That order, though actually the order of a Division Court, is virtually the order of the High Court, and is final, and cannot be reviewed by the High Court, there being no provision in the Code for the review of an order made by the High Court under s. 297. Neither is there any appeal to the Full Court from an order made under s. 297 by a Division Court. To re-open the question whether the Agra Courts had jurisdiction is to allow such an appeal to the Full Court.

Pandit *Ajudhia Nath*.—The question now is whether the appellant has been convicted by a Court of competent jurisdiction. That question was not decided by the order of the 24th January. With reference to the question of jurisdiction, the preamble to Act XI of 1872 shows that the term "Native State" as used in the Act can only mean, with reference to Native Indian subjects, places beyond the limits of British India in which the Governor-General of India in Council has power and jurisdiction. The definition of the term in s. 3 of the Act must be read in connection with the preamble. Cyprus is not a place beyond the limits of British India in which the Governor-General in Council has power and jurisdiction, and it does not therefore fall within the definition of a "Native State." Under Article 171 of the Indian Articles of War the appellant should have been tried by Court Martial.

The *Junior Government Pleader*.—Act XI of 1872 is an Act for, amongst other things, amending the law relating to offences committed by British subjects beyond the limits of British India, and to the extradition of criminals. By s. 1 of the Act the Act



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extends to all Native Indian subjects of Her Majesty without and beyond the Indian territories of Her Majesty. The term "Native State" as used in the Act expresses shortly what it took several sections of Act I of 1849, the law amended by Act IX of 1872, to express. Cyprus is a place beyond Her Majesty's Indian territories, and therefore falls within the definition of the term "Native State" contained in s. 3 of Act IX of 1872. The appellant could have been tried in this country under Act I of 1849, and Act XI of 1872 only amends that law. S. 3 of the Indian Penal Code contemplate that offences committed beyond British India are triable within British India. The power of a State to try and punish within such State offences committed by its subjects beyond its limits is allowed by authorities on international law, see Wheaton on International Law, 8th ed., pp. 179, 180. That power has been recognised and given effect to by English Acts of Parliament, see 26 Geo. III, c. 57, s. 29, and 33 Geo. III, c. 52, s. 67.

The following judgments were delivered by the Full Court:

STUART, C.J.—This is a reference for confirmation of a capital sentence passed on the accused Sarmukh Singh by the Sessions Judge of Agra under these circumstances: On the recent occupation by the British of the Island of Cyprus, situated in the Mediterranean, and within the Empire of European Turkey, one of the regiments forming part of the military forces on the occasion was an Indian regiment, the 13th Native Infantry, and in the regiment was a man named Sarmukh Singh. On the night or early in the morning of the 21st of August 1878, while the regiment was still at Cyprus, another sepoy named Dewa Singh came to his death by a shot from a rifle fired, it was believed, by Sarmukh Singh. He was at once placed in custody by the military authorities, and on the return of the regiment shortly after to Agra, in the North-Western Provinces of India, he was handed over to the Civil Court of that district for trial, and the case came before the Cantonment Magistrate of Agra for the purpose of commitment. But the Cantonment Magistrate believing that he had no jurisdiction to entertain the case ordered the prisoner to be at once sent back to the Commanding Officer of the regiment, with an intimation to that effect;

whereupon an application for revision under s. 297 of the Criminal Procedure Code was made by the Government to this Court complaining of the Magistrate's proceeding, and praying that he be ordered to inquire into the charge against the accused, with a view to his commitment for trial to the Court of Session at Agra. On that application coming before a Bench of the Court, Pearson and Turner, JJ., the accused was not represented, while the Government Pleader appeared for the Crown. The case was therefore heard *ex parte*, and in the result the application for revision was granted, the Bench being of opinion, from their reading of Act XI of 1872, that notwithstanding that the facts had occurred at Cyprus, the civil authorities of Agra had jurisdiction to entertain the case, and the Contonment Magistrate was ordered to inquire into the charge. The inquiry was accordingly made, and the accused committed for trial on the charge of murder before the Sessions Judge of Agra, who, after hearing evidence, convicted the accused, Sarmukh Singh, and sentenced him to death.

On the case coming up to this Court again for confirmation of sentence, and feeling serious doubts of the soundness of the decision in favour of the jurisdiction at Agra, I directed the case to be brought before the Full Bench by the following order: "In the ordinary course this case should go before a Bench of the Court for confirmation of the capital sentence, but the peculiarity of the procedure that has taken place is such that I consider it ought to be heard by myself and the Judges of the Court in Full Bench. The reference to us for confirmation of the sentence assumes that the Magistrate and Judge of Agra had jurisdiction to entertain the case, and it has been so decided by a Division Bench of this Court. But the proceeding was entirely *ex parte*, and the question may be reconsidered. I therefore direct that this case be brought before a Full Bench of the Court."

The case came before a Full Bench accordingly, when Pandit Ajudhia Nath, a pleader of this Court, appeared for the accused against the confirmation of the sentence, on two grounds, the first of which was that, whereas the murder is said to have been committed by the appellant in Cyprus, the Sessions Judge of Agra had no jurisdiction to try the appellant on that charge; the second ground

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was on the merits and for the purpose of this judgment need not be further referred to.

On the reference for confirmation of the sentence coming on for consideration, the Junior Government Pleader took preliminary objection that the judgment of the Division Bench could not be called in question in such a proceeding, but that contention we had no difficulty in disallowing. My colleagues Mr. Justice Spankie and Mr. Justice Oldfield have given cogent reasons against such an objection, and in all they say on this subject I concur. But I may add it appears to me that such an objection is sufficiently disposed of by s. 297 of the Criminal Procedure Code. By s. 288 it is provided that "in any case so referred, whether tried with assessors or by jury, the High Court may either confirm the sentence, or pass any other sentence warranted by law, or may annul the conviction, and order a new trial on the same or an amended charge, or may acquit the accused person;" and any sentence warranted by law includes of course any judgment, sentence, or order authorised by s. 297.

The argument was then addressed to the principal question raised by the reference, *viz.*, whether the Court at Agra had jurisdiction to try the accused for the murder alleged to have been committed by him in Cyprus, and on that question the doubt I originally entertained when I read the judgment of the Division Bench has on reflection been fully confirmed. The question is one purely of law, and depends for its solution on the true intent and meaning of Act XI of 1872 entitled "an Act to provide for the trial of offences committed in places beyond British India and for the Extradition of Criminals." Other Acts of the Indian Legislature and of the British Parliament were referred to, but at best they appear to me to serve merely as illustrative of what had been done in regard to the commission of and trial for offences under different, although analogous, circumstances, while they did not appear to me to give any support to the argument for the Crown. These Acts and authorities were Act I of 1849, the Indian Articles of War, being Act V of 1869, and provisions in two Acts of the British Parliament, 26 Geo. III, c. 57, s. 29, and 33 Geo. III, c. 52, s. 67. I shall afterwards refer more particularly to these authorities, but meanwhile I desire to direct attention to Act XI of 1872 upon the true

construction of which the question now before us more especially depends, and it contains within itself matter quite sufficient for that purpose. The judgment of the Bench now under our consideration begins by referring to s. 9, and for the meaning of the words "Native State" there, the interpretation of the expression as given in s. 3 of the Act is referred to, it being assumed that that definition is wide enough to include not only Indian Native States, but all other places in any part of the world without and beyond British India, and that therefore the Island of Cyprus is a "Native State" within the meaning of the definition. And no doubt if this definition could be read by itself without reference to or connection with any other part of the Act, it is comprehensive enough to include not only Cyprus but any "place" in the habitable globe. Can that really have been the meaning and intention of the Legislature when it passed this Act? It seems impossible to believe it. The Act itself shows the limits within which the definition in question is to be applied, and we have only to look to the preamble to see what these limits are. It is remarkable that the judgment now under our consideration makes no allusion whatever to the preamble, but reads the term "Native State" simply by itself and without the least regard to such a guide and light in the interpretation of Acts of the Legislature as the preamble. The preamble is as follows: "Whereas by treaty, capitulation, agreement, grant, usage, sufferance and other lawful means the *Governor-General of India in Council* has power and jurisdiction within divers places beyond the limits of British India; and whereas such power and jurisdiction have from time to time been delegated to Political Agents and others acting under the authority of the *Governor-General in Council*; and whereas doubts have arisen how far the exercise of such power and jurisdiction and the delegation thereof are controlled by and dependent on the laws of British India; and whereas it is expedient to remove such doubts, and to consolidate and amend the law relating to the exercise and delegation of such power and jurisdiction, and to offences committed by British subjects beyond the limits of British India, and to the extradition of criminals: It is enacted, &c." The purpose, intent, and limits of every thing in the Act are thus plainly seen, and "Native State" means and means only a place so defined, that is, a place where by treaty, &c., the Governor-General

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of India in Council has jurisdiction, and Cyprus certainly is not such a place. The Government of India have no power and jurisdiction there, no more than that Government has power and jurisdiction in all the capital towns and countries not only of Europe but in the four quarters of the globe. This is what the ruling of the Division Bench not only leads to, but necessarily involves. In support of that ruling the two forms of the definition as given in the Act were referred to as showing that places such as Cyprus were clearly within the meaning of the first part of the definition, and which states that "Native State" means, "in reference to Native Indian subjects of Her Majesty, all places without and beyond the Indian territories under the dominions of Her Majesty," and this *arguendo* was contrasted with the other part of the definition, which says that "Native State" means, "in reference to European British subjects, the dominions of Princes and States in India in alliance with Her Majesty." But so far from affording any contrast to the first part of the definition, it is simply to my mind, as regards the expression "Native State," another way of saying the same thing, unless it be supposed that the Legislature of India were anxious to provide against the possibility of their being understood to have contemplated the application of the Indian Penal Code to Englishmen on account of offences committed in England, or any part of Europe where there is established law and properly constituted tribunals. Both parts of the definition read by the light of the preamble mean one and the same thing, *vis.*, a "Native State," where by treaty, capitulation, &c., the Governor-General has power and jurisdiction.

Allusion was made at the hearing to the third and fourth sections of the Indian Penal Code, Act XLV of 1860. S. 3 provides that "any person liable by any law passed by the Governor-General of India in Council to be tried for an offence committed beyond the limits of the said territories, shall be dealt with according to the provisions of this Code for any act committed beyond the said territories in the same manner as if such act had been committed within the said territories." This raises, in a somewhat loose way, the same argument we have had to consider under Act XI of 1872. It is to be observed that the Indian Penal Code was passed in

1860, and came into operation on the 1st January 1862, and therefore long before the passing of Act XI of 1872, and it affords therefore no assistance in interpreting the words "Native State" as used in that Act, although I think it can only mean "Native State" within the purview of its preamble. And by s. 4 of the Penal Code the words "the dominions of any Prince or State in alliance with the Queen" are to my mind plainly synonymous with "Native State" as used in Act XI of 1872. But is it really the case that Cyprus is a "Native State" in the sense of being a foreign country, *i.e.*, a country not subject to but foreign to the Queen's Government? I think it may be gravely doubted whether Cyprus is such a "Native State" or a "Native State" in any sense whatever. It has for the present been ceded by the Turkish Government to the Crown of England. This is shown by the treaty between the two powers called "Convention of defensive alliance between Great Britain and Turkey," signed the 4th June 1878, and by the first articles of which it is, among other things, provided as follows: "In order to enable England to make necessary provision for executing her engagements, His Imperial Majesty the Sultan further consents to *assign the Island of Cyprus to be occupied and administered by England,*" and the Island is accordingly occupied by military forces directly under the control and command of the Queen's Government, and it is governed, and in all respects fully administered, by English officials, and it would be hopeless to discover this state of things as in any way contemplated by Act XI of 1872, or to maintain that Cyprus under such conditions was within the meaning and intent of that Act a "Native State," for so far from being a place in the sense of a "Native State" without and beyond the dominion of Her Majesty, it is directly administered by Her officers, and is under Her Majesty's dominion and control.

I shall now briefly notice the other Acts and authorities to which I have already alluded as bearing on the construction to be put on Act XI of 1872. The first of these is Act I of 1849, which is entitled "an Act to provide more effectually for the punishment of offences committed in Foreign States," and which, to say the least, affords no support whatever to the argument for the prosecution. It recites the various old Indian Regulations which it states it is

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expedient to make more effectual and uniform, and also to extend their application, and then by s. 2 it provides that "all subjects of the British Government, and also all persons in the civil or military service of the said Government, while actually in such service and for six months afterwards, and also all persons who shall have dwelt for six months within the *British territories* under the Government of the East India Company, subject to the laws of the said territories, who shall be apprehended *within the said territories or delivered into the custody of a Magistrate within the said territories, wherever apprehended*, shall be amenable to the law for all offences committed by them *within the territory of any Foreign Prince or State*, and may be bailed or committed for trial as hereafter provided, on the like evidence as would warrant their being held to bail or committed for the same offence, if it had been committed within the British territories." This speaks for itself, the expression Foreign Prince or State plainly meaning not such a place as Cyprus, but any Foreign Prince or State in India, or in other words, "Native State," while by the words "the British territories" can only be intended territories or possessions in India as distinguished from those of a "Native State" there. The expression "*the British territories*" occurs in other section of the Act, while the word "Government" is defined to mean the *Governor or Governor in Council or other person or persons having supreme executive authority in the Presidency or place to which the committing Magistrate belongs*. The whole Act is only intelligible as a law to be carried out in India, having reference on the one hand to the British territories and on the other to those of Native Princes or States. S. 9, the last section of this Act, is not undeserving of notice; it provides that the authority given to the Government may also be exercised by any Commissioner or other person acting in the civil service, a provision which is consistent with the other portions of the Act, and which it would surely be absurd to apply to Cyprus.

With regard to the Indian Articles of War, Article 151 has been referred to. It is there provided that "in any place out of British India offences against the Indian Penal Code, and not included in the foregoing Articles, shall, when committed by any person amenable to these Articles, be cognizable by a General Court Martial

to be convened by any Officer who is empowered by warrant, or Order in Council, or by Article 77, to appoint General Courts Martial." Now it appears to me that the fair inference from such an express provision is that, in contemplation of the Legislature which passed it, there was no other law on the subject, and the trial by Court Martial was the only and sole proceeding intended for offences against the Indian Penal Code committed in places out of British India by persons subject to the Articles of War. Such offences are distinctly and expressly so specified, and we are not left to surmise or suggestion such as is necessary in order to favour the reading of the term "Native State" as maintained by the prosecution in this case.

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The next authority referred to in support of the conviction was the 29th section of the Act of Parliament, 26 Geo. III, c. 57, as showing that the jurisdiction of the Courts in British India over any of the King's subjects could be extended so as to include cognisance of offences committed beyond British territory, and not only in India, *i.e.*, in States governed by Native Princes, but in other parts of the world. But in my judgment the 29th section has exactly the opposite effect, for it plainly appears to me to limit the extension of the authority of the Courts in question to the countries or parts of the world specially selected and named, and that not only no other places but that no general or indefinite extension of jurisdiction was intended. The 29th section of 26 Geo. III, c. 57, is in these terms: "That as well the servants of the said United Company, as all other of His Majesty's subjects resident or to be resident in India, shall be and are hereby declared to be amenable to the Courts of oyer and terminer and goal delivery, and Courts of general or quarter sessions of the peace, in any of the British settlements in India, for all murders, felonies, homicides, manslaughters, burglaries, rapes of women, perjuries, confederacies, riots, routs, retainings, oppressions, trespasses, wrongs, and other misdemeanours, offences, and injuries whatsoever, by them done, committed, or perpetrated, in any of the countries or parts of *Asia, Africa or America, beyond the Cape of Good Hope, to the Straits of Magellan, within the limits of the exclusive trade of the said United Company, whether the same shall*



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have been done, committed, or perpetrated, or shall hereafter be done, committed, or perpetrated, against any of His Majesty's subjects, or against any other person or persons whatever." It will be observed that the countries or parts of the world to which this section was to apply were "Asia, Africa, or America, beyond the Cape of Good Hope, to the Straits of Magellan," a definition and description which by no contrived meaning or ingenuity could be made to apply to Cyprus or any other place in the same position or relation to the British Government or the Government of India.

The only other authority in support of the conviction I need refer to was another Act of the British Parliament, the 33 Geo. III, c. 52, and s. 67 of that Act. I was I confess not a little surprised that this s. 67 should have been referred to on behalf of the Government, for it is not only plainly inconsistent with the conviction of the accused by the Agra Court, but it supplies an express definition of the lands or territories to which its application was to be limited altogether at variance with the meaning attempted to be put upon the term "Native State" as that is used in Act XI of 1872. S. 67 of the 33 Geo. III, c. 52, is in the following terms: "That all His Majesty's subjects, as well servants of the said United Company as others, shall be and are hereby declared to be amenable to all Courts of Justice, both in India and Great Britain, of competent jurisdiction to try offences committed in India, for all acts, injuries, wrongs, oppressions, trespasses, misdemeanours, offences, and crimes whatever, by them, or any of them, done, or to be done, or committed in any of the lands or territories of any Native Prince or State, or against their persons or properties, or the persons or properties of any of their subjects or people, in the same manner as if the same had been done or committed within the territories directly subject to and under the British Government in India." The words here used are thus made distinctly to apply to "the lands or territories of any Native Prince or State," and the offences described being offences "committed in India," and the expression "Native State" must be similarly limited. This provision therefore of the 33 Geo. III, c. 52, is an authority directly and expressly against the jurisdiction of the Agra Court in the present case.

I have now, I think, adverted to all the principal authorities referred to in support of the conviction and of the application for confirmation of sentence, and, I think, I have shown that not only do they fail to afford that support, but that their weight, if not their distinct and express bearing, is entirely in the opposite direction. The conclusion therefore at which I arrive is that Cyprus is not a "Native State" within the meaning of Act XI of 1872, that in fact it is not a "Native State" in any sense. It never was and is not now a "Native State" in relation to Turkey, for it was and in some sense still is part of the Turkish dominions. It cannot I consider be otherwise in its relation to the English Crown and Government, nor can we make it so by any interpretation of our laws.

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But there is another and most serious consideration which I feel bound to notice, *viz.*, whether it is within the powers of the Indian Legislature not to pass such a law as Act XI of 1872, but a law capable of such a construction as is necessary in order to sustain this conviction of Sarmukh Singh. In other words can the Government of India in its legislative capacity pass a law for trial and punishment in respect of offences committed in other territories and jurisdictions governed and administered by and equally representing the Crown and Government of England? I think the answer to these questions in the affirmative might be successfully disputed. On this subject our attention was directed to certain opinions expressed by Wheaton in his *International Law*, 8th edition, pp. 179, 180, ss. 111-113. Wheaton there lays down that every sovereign State is independent of every other, in the exercise of its judicial power. But this general position must of course be qualified by the exceptions to its application arising out of express compact, such as conventions with foreign States, and acts of confederation, by which the State may be united in a league with other States, for some common purpose. "Subject to these exceptions, the judicial power of every State is co-extensive with its legislative power." Wheaton goes on to state that: "The judicial power of every independent State, then, extends, with the qualifications mentioned,—(1) to the punishment of all offences against the municipal laws of the State, by whomsoever committed within the territory; (2)

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to the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in foreign ports; (3) *to the punishment of all such offences by its subjects, wheresoever committed.*" This last sentence would require more precise definition even if Cyprus was truly a "Native State" within the meaning of Act XI of 1872, without the tribunal and procedure afforded by the Articles of War. Wheaton further lays down as follows: "By the common law of England, which has been adopted in this respect in the United States, criminal offences are considered as altogether local and are justicable only by the Courts of that country where the offence is committed. But this principle is peculiar to the jurisprudence of Great Britain and the United States, and even in these two countries it has been frequently disregarded by the positive legislation of each, in the enactment of statutes, under which offences committed by a subject or citizen, within the territorial limits of a foreign State, have been made punishable in the Courts of that country to which the party owes allegiance, and whose laws he is bound to obey. There is some contrariety in the opinions of different public jurists on this question; but the preponderance of their authority is greatly in favor of the jurisdiction of the Courts of the offender's country." The legal doctrine which it is here admitted is paramount in the British and American Courts, *vis.*, that criminal offences are local and triable only where committed, appears to be qualified in a rather doubtful manner, on the authority too of certain jurists among whom there is a difference of opinion, although the weight of authority favors the jurisdiction of the offender's country, and the views so stated assume their application to a distinctly foreign State. But it is unnecessary to pursue the subject further, as, I think, I have shown that Cyprus is clearly not a foreign or "Native State" according to the true intent and meaning of Act XI of 1872.

For all these reasons I am of opinion that the conviction in the present case cannot stand, seeing that it rests on the authority of a Court which was without jurisdiction to try the accused.

PEARSON, J.—The question of jurisdiction raised by the first plea in appeal, and decided by Mr. Justice Turner and myself on

the 24th January last, and now brought before the whole Court for reconsideration, is in so far as it relates to s. 3 of Act XI of 1872 simply whether Cyprus is or is not without and beyond the Indian territories under the dominion of Her Majesty; upon this point there is no room for discussion. The provisions of s. 9 of the Act appear to be quite within the competency of the Legislature, and to be not less consistent with sound reason and good policy than conducive to the interests and ends of justice.

Apart from the question whether Cyprus is a Native State as defined in s. 3 of Act XI of 1872 is the question of the construction to be put on the 170th and 171st Articles of War. I entertain no doubt that the construction placed by Mr. Justice Turner and myself in our proceeding of the 24th January last is correct.

The evidence on the record fully convicts the prisoner of the offence of murder, and there are no circumstances which would warrant a modification of the sentence passed upon him by the Agra Sessions Court. I would dismiss his appeal and confirm the sentence.

SPANKIE, J.—A preliminary objection was taken by the Junior Government Pleader, that this Court had no power to review under s. 297 of the Criminal Procedure Code the ruling that the Cantonment Magistrate of Agra had jurisdiction to inquire into the charge of murder preferred against Sarmukh Singh. The Criminal Procedure Code provides that no judgment or final order, once signed, shall be altered or reviewed by the Court which gives such judgment or order we are not now asked to review the order of the Division Bench which directed the Magistrate to commence the inquiry. That order was not a final order or judgment in the case. It was a preliminary order. At the stage at which the case has now arrived, we are called upon to consider whether we can confirm the sentence of death passed upon the prisoner who has been convicted of murder. An appeal has been preferred from the sentence passed by the Sessions Judge, and the question of jurisdiction has again arisen. The case has been laid before all the Judges of this Court, and I do not understand how we are precluded from determining this question of jurisdiction because, for the purpose of determining whether or not the Magistrate should make an inquiry, a Division

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Bench of the Court had ruled that he was competent to do so. If we come to a decision that there was no jurisdiction, then the commitment was bad, we could not confirm the sentence of death, and would be competent to annul the proceedings. Again, if there was no jurisdiction, it would be monstrous if we were to hold that we were bound to accept as conclusive the order of this Court sitting as a Division Bench, directing the Magistrate to commence his preliminary inquiry.

On the point of jurisdiction I see no possibility of differing from the learned Judges who directed that the inquiry should proceed. Act XI of 1872 is one to provide for the trial of offences committed in places beyond British India, and for the extradition of criminals. It is called the Foreign Jurisdiction and Extradition Act. The definition of Native State may be arbitrary, but it must be accepted. There is no doubt whatever of the power of legislation to pass such an Act in regard to the native subjects of the Empress, and if this be so, the object of the Act being to provide for the punishment of offences committed by them beyond British India as if they had been committed in British India, Cyprus or any other foreign country, would be a "Native State," in reference to the prisoner in this case, within the meaning of the Act. I also accept the view taken by the learned Judges as to Articles 170 and 171 of the Articles of War. There are no grounds whatever for not accepting the decision of the Sessions Judge on the merits. I would therefore confirm the sentence of death passed upon the prisoner.

OLDFIELD, J.—The material point raised by the counsel for the prisoner is that the Agra Sessions Court had no jurisdiction to try the prisoner, a soldier in the 13th Native Infantry, for the offence of murder committed in Cyprus. A preliminary objection was taken on the part of the prosecution that the Court cannot now go into the question of jurisdiction, since it has been determined by the order of two Judges of this Court on the 24th January 1879. That order was made under s. 297 of the Criminal Procedure Code, and it directed the Cantonment Magistrate of Agra to inquire into the charge against the prisoner, and in passing the order the learned Judges held that the Agra Court had jurisdiction to entertain the charge.

The case is now before this Court for confirmation of the sentence of death passed by the Sessions Judge on the prisoner, convicted for murder under s. 302 of the Indian Penal Code, and in dealing with it, it is incumbent on us and our absolute duty before we can affirm the sentence to satisfy ourselves that the sentence is one which could legally be passed by the Sessions Judge, and we cannot be restricted by any order which may have been passed in the course of the proceedings. I may add that I can find no prohibition in the Code of Criminal Procedure against a review of an order of the nature of the one which has been made in this case. The only express prohibition contained in the Criminal Procedure Code against altering or revising orders is in s. 464, and that section refers to judgments and final orders given under chapter xxxiv on conclusion of a trial in any Criminal Court.

On the question of jurisdiction I concur in the view taken by Mr. Justice Pearson and Mr. Justice Turner in their order of the 24th January last. Act XI of 1872 is an "Act to provide for the trial of offences committed in places beyond British India, and for the extradition of criminals." S. 1 makes it apply to "all Native Indian subjects of Her Majesty without and beyond the Indian territories under the dominion of Her Majesty," and by s. 9 "all British subjects, European or Native, in British India, may be dealt with in respect of offences committed by them in any Native State as if such offences had been committed in any place within British India in which any such subject may be or may be found," and "Native State" is defined in s. 3 to mean, "in reference to Native Indian subjects of Her Majesty, all places without and beyond the Indian territories under the dominion of Her Majesty; in reference to European British subjects, the dominions of Princes and States in Indian alliance with Her Majesty." It has been urged that it could not have been intended that the term "Native State" should include a remote country like Cyprus, that the term Native State is not a fitting term to apply to States beyond the Peninsula of India, but such a consideration as this cannot be allowed to override the plain language of the Act, which admits of but one interpretation, namely, that all places without and beyond the Indian territories under the dominion of Her Majesty are "Native States" in the

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sense in which the term is used in the Act. And the objection deserves little weight when we find that the term is used in different senses in the Act, when referred to Native Indian subjects and European British subjects. The term took the place of that of "territories of any foreign Prince or State" used in Act I of 1849, and that it was intended to have a very extended application is shown by some alterations in the language of the Act as passed, and as it was first introduced. The Governor-General in Council was given under a previous draft of the Act power to establish Courts for trial of offences committed in "the territories of Native States and Princes in and adjacent to British India," and for the appointment of Justices of the Peace in such State or territory, whereas in the Act as it was passed these powers can be exercised "within any country or place beyond the limits of British India."

I should have scarcely thought it necessary to enter so fully into this point, but for the stress which was placed on it by the prisoner's pleader. Cyprus is therefore clearly a Native State within the meaning of the Act. It was also pointed out that by a proviso in s. 9 no charge as to any offence shall be inquired into a British India unless the Political Agent, if there be such for the territory in which the offence is said to have been committed, certifies that in his opinion the charge is one which ought to be inquired into in British India, but this proviso only applies "if there be such" a Political Agent in the territory, and it has not been shown that any such Political Agent, that is, as defined in s. 3, any officer representing the British Indian Government, was established at Cyprus. The prisoner can therefore be dealt with in respect of the offence alleged to have been committed in Cyprus as if such offence had been committed in the Agra Cantonment.

Referring to Article 170 of the Indian Articles of War, "Any person subject to these Articles, who, at any place in British India within the jurisdiction of any Court of Criminal Justice established by Her Majesty, or by the Government of India, or by the Local Government, is accused of any offence against the Indian Penal Code, and not included in the foregoing Articles, shall be delivered over to the nearest Magistrate to be proceeded against according to law."

The Penal Code applies to British India, *i.e.*, the territories defined in the 1st section of the Code, and had the prisoner been accused at Agra of an offence against the Indian Penal Code he would have been delivered over to the nearest Magistrate to be proceeded with according to law, and the effect of s. 9 of Act XI of 1872 will be to permit his being dealt with for the offence committed in Cyprus as if it had been committed within British India and the proceedings which have been taken are therefore quite according to law. There is nothing in Article 171 inconsistent with effect being given to Article 170.

The crime of murder is clearly proved against the prisoner, and in my opinion the sentence of death must be confirmed.

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### APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Spinkie.*  
GULAB SINGH (PLAINTIFF) v. AMAR SINGH AND ANOTHER  
(DEFENDANTS).\*

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*Pre-emption—Limitation—Act XV of 1877 (Limitation Act), sch. ii, art. 10.*

On the 19th December 1876 *A* gave *T* a mortgage of his share in a certain village. The terms of the mortgage were that *A* should remain in possession of his share, and pay the interest on the mortgage-money annually to the mortgagee, who, in the event of default in payment of the interest, was empowered to sue for actual possession of the share. On the 19th May 1877 *T*'s name was substituted for that of *A* in the proprietary registers in respect of the share. On the 8th February 1878 *G* sued *T* and *A* to enforce his right of pre-emption in respect of the share, alleging that his cause of action arose on the 19th May 1877, and that *A*, notwithstanding the mutation of names, was still in possession. *T* alleged that he had been in possession since the execution and registration of the deed of mortgage. *Held* that whether *T* had been in plenary possession of the share since the date of the deed, or whether he had only such constructive or partial possession of it as was involved in the receipt of interest on the mortgage-money, the plaintiff was equally bound to have sued within a year from the date of the deed, and was not entitled to reckon the year from the date on which the possession by the mortgagee of the share was recognised by the revenue department, and the suit was therefore barred by art. 10, sch. ii of Act XV of 1877.

THE facts of this case are sufficiently stated, for the purposes of this report, in the judgment of the High Court, to which the

\* Second Appeal, No. 1076 of 1878, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 8th August 1878, affirming a decree of Munshi Mahabir Prasad, Munsif of Etah, dated the 8th March 1878.



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plaintiff appealed from the decree of the lower appellate Court. That decree affirmed the decree of the Court of first instance, which dismissed the plaintiff's suit as barred by limitation.

The plaintiff contended in second appeal that limitation ran from the date that mutation of names took place, and the suit was consequently brought within time.

Babu *Oprokash Chandar*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

The judgment of the High Court was delivered by

PEARSON, J.—On the 19th December 1876 Amar Singh borrowed money from Tota Ram, and mortgaged his zamindari share as security for the repayment of the amount. The agreement was that the mortgagor should remain in possession of his share and pay the interest on the loan annually to the mortgagee, who, in the event of default in payment of the interest, was empowered to sue for actual possession of the share. By the terms of the *wajib-ul-arz* the plaintiff contends that he was entitled to have had an offer of the share made to him before it was mortgaged to Tota Ram, and he now claims proprietary possession of it. The suit was instituted on the 8th February 1878 and the cause of action is said to have arisen on the 19th of May 1877, when Tota Ram's name was substituted for that of Amar Singh in the proprietary registers in pursuance of the transaction. The plaintiff, however, alleges that Amar Singh, notwithstanding the mutation of registry, is still in possession of the share. On the other hand Tota Ram alleges that he has been in possession of it since the execution and registration of the deed of mortgage. Whether the mutation of registry was merely a precaution to secure the mortgagee's interests, whether he has been only hitherto receiving the interest due to him annually for the mortgagor still in possession of the share, or, whether in consequence of default in payment of the interest the share has passed into the actual possession of the mortgagee, these are questions which find no answer in the judgments of the lower Courts. But it seems to us that whether, as Tota Ram avers, he has been in plenary possession since the date of the deed, or

whether, in accordance with the tenor of the deed he has only had such constructive or partial possession of it as is involved in the receipt of interest on the loan secured by the mortgage, the plaintiff was equally bound to have brought his suit within a year from the date of the deed, and is not entitled to reckon the year from the date on which the possession of the mortgagee of the share was rightly or wrongly recognised by the revenue department. Concurring therefore in the opinion of the lower Courts that the suit is barred by art 10, sch. ii of Act XV of 1877, we disallow the pleas in appeal, and dismiss the appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

MANGAL KHAN (DEFENDANT) v. MUMTAZ ALI AND OTHERS  
(PLAINTIFFS).\*

1879  
March 31.

*Land in a mahal held by the lambardar as "khud-kasht" at a nominal rental—Liability of lambardar to co-sharer for profits—Act XVIII of 1873 (N.-W. P. Rent Act), ss. 3, 31, 209.*

The land in a certain mahal was recorded as held by *M*, the lambardar, as "*khud-kasht*" at a certain nominal rental. For two years in succession *M* sub-let such land in part or in whole for a less amount than such nominal rental; the third year such land lay fallow. Certain persons sued as co-sharers in the mahal to recover from *M* their share of the profits on account of such years. *M* set up as a defence to the suit that there were no profits, on the contrary, a small loss. The lower Courts held *M* answerable for the rental recorded.

*Held* that it was doubtful whether the provisions of s. 209 of Act XVIII of 1873 were applicable in the present case, and that, even if such provisions were applicable, the lower Courts having neither found that more was realised from the land than had been accounted for by *M*, nor that the failure to realise more was owing to gross negligence or misconduct on his part, the decree of the lower Courts could not be sustained.

THIS was a suit by three co-sharers for their share of the profits of a mahal for the years 1282, 1283, and 1284 fasli. The defendant in the suit was the lambardar of the mahal, and held all the land in the mahal at a certain rent. He set up as a defence to the suit that he had not cultivated the land. The Court of first instance held that the defendant was liable for the recorded rent of the land

\* Second Appeal, No. 1068 of 1878, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 30th July 1878, modifying a decree of J. L. Denniston, Esq., Assistant Collector, dated the 8th June 1878.

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irrespective of the question whether or not he had cultivated the land, or how much rent he had realised from his sub-tenants, and it gave the plaintiffs a decree. On appeal by the defendant the lower appellate Court also held that the defendant was liable for the recorded rent, but disallowed the interest claimed by the plaintiffs.

The defendant appealed to the High Court, contending, amongst other things, that he was not liable for uncollected profits unless he had omitted to collect them through gross negligence or misconduct, which was not found.

Munshi *Kashi Prasad*, for the appellant.

Pandits *Ajudhia Nath* and *Nand Lal*, for the respondents.

The judgment of the Court was delivered by

PEARSON, J.—The land in this mahal appears to have been recorded as the *khud-kasht* (1) of the lambardar Mangal Khan, and to have borne a nominal rental of Rs. 79-6-0. In 1282 and 1283 fasli it is stated to have been underlet by him in part or in whole for Rs. 28-6-0, and in 1284 fasli to have lain fallow.

This is a suit brought by the plaintiffs as co-sharers in the mahal for Rs. 115-6-0 as their share of the profits on account of the three years above-mentioned. The answer is that, in reference to the facts above stated, there were no profits; on the contrary, a small loss. The lower Courts have, however, held him answerable for the rental borne on the rent-roll; and the question for our consideration is whether the view taken by them of his responsibility is correct. It appears that in April 1876 he attempted to get rid of his responsibility by resigning the holding. The Assistant Collector calls it his *sir-land*, whether rightly or not, in reference to the definition in s. 3 of the Rent Act, we have no means of ascertaining. The attempt was disallowed by the Collector. It may be a question whether s. 31 of that Act is applicable to such a holding. The lambardar's position as cultivator of the joint land was not that of an ordinary tenant. His co-sharers in the estate could scarcely have sued him as a tenant for the amount entered in the rent-roll

(1) "*Khud-kasht*" is the term applied in the N.-W. Provinces to lands which the proprietor cultivates himself.

as the rent of the land, or even for a share of it proportionate to their shares in the mahal; although he may have been bound to distribute to them according to their shares the profits realised from it after defraying the expenses of cultivation and paying the Government revenue and village-expenses. S. 209 of the Rent Act provides that, in any suit brought by a co-sharer against a lambardar for a share of the profits, the Court may award to the plaintiff not only a share of the profits actually collected, but also a sum equal to the plaintiff's share in the profits which, through gross misconduct or negligence, the lambardar has omitted to collect. But for this special provision, such an award could not be made in a suit for profits, and it seems very doubtful whether that provision is applicable in the present case. The position of a lambardar who fails to collect rents fixed on lands held by tenants is very different from that of a lambardar who is unable to arrange for the cultivation of lands sometime held by him as *khud kasht*. In the present case even were s. 209 applicable, the lower Courts have neither found that more was realised from the land than has been accounted for by the lambardar, nor that the failure to realise more was owing to gross negligence or misconduct on his part. Such being the state of things disclosed by the record, we are of opinion that the decree of the lower Courts cannot be sustained. We accordingly decree the appeal and dismiss the suit with costs in all the Courts.

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*Appeal allowed.*

### PRIVY COUNCIL.

STUART SKINNER *alias* NAWAB MIRZA (PLAINTIFF) v. WILLIAM ORDE AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Allahabad, North-Western Provinces.]

P. C.\*  
1879  
March 20  
and 21.

*Pauper petition—Payment of Court-fees by petitioner—Date of institution of suit—Limitation—Act VIII of 1859, s. 13—Transfer of suit.*

Where a person, being at the time a pauper, petitions, under the provisions of Act VIII of 1859, for leave to sue as a pauper, but subsequently, pending an inquiry into his pauperism, obtains funds which enable him to pay the Court-fees, and his petition is allowed upon such payment to be

\* *Present* :—SIR J. W. COLVILLE, SIR M. E. SMITH, and SIR R. P. COLLIER.

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numbered and registered as a plaint, his suit shall be deemed to have been instituted from the date when he filed his pauper petition, and limitation runs against him only up to that time.

S. 13, Act VIII of 1850, enacts that where a suit is brought for immoveable property situated within districts subject to different Sudder Courts, the Judge in whose Court the suit is brought shall apply to the Sudder Court to which he is subject for authority to proceed, and the Sudder Court to which the application is made, with the concurrence of the other Sudder Court within whose jurisdiction the property is partly situated, may give authority to proceed. But no power is expressly given in the section cited, or elsewhere in the Act, to direct the transfer of a suit brought in a Court subordinate to one Sudder Court to a Court subordinate to another Sudder Court. *Quære*.—Whether Sudder Courts acting in concurrence have power to make such a transfer?

THIS was an appeal from a decision of the High Court of the North-Western Provinces, dated the 29th May 1876 (1), affirming a decision of the Subordinate Judge of Meerut, dated the 6th July 1875.

The question of law raised by the case was as to whether the claim of the appellant, who had originally applied for leave to sue *in forma pauperis*, but had afterwards paid the institution fees, was barred by limitation.

The facts of the case are fully set forth in the judgment of their Lordships of the Privy Council.

Mr. J. D. Mayne (Mr. C. W. Arathoon with him) for the appellant.—The question whether the appellant was a pauper was decided by the Deputy Commissioner of Delhi, who had jurisdiction to decide it, and whose decision on the point was, consequently, binding on the Meerut Court to which it was transferred. To enable him to decide the question of pauperism, the Deputy Commissioner did not require any special authority from the Chief Court of the Punjab. Had he found that the appellant was not a pauper, he would have had no occasion to apply to the Chief Court for leave to try the case. There would have been no suit to try. Ss. 11, 12, and 13 of Act VIII of 1859, which relate to suits where the property is situated in different districts, assume that all that is necessary has been done to bring the proceedings into the form of a *suit*. The petition of a person alleging himself to be a pauper does not become a *suit* until he is found to be a pauper and his

(1) The judgment of the High Court is printed at page 230, Vol. I of these Reports.

application is admitted as a plaint. It is only proceedings in the suit which, under the sections referred to, require sanction from the Sudder Court. If, after finding the appellant to be a pauper, the Deputy Commissioner failed to cause the petition to be numbered and registered as a plaint, that was his fault, and cannot prejudice the appellant. He applies to the Chief Court of the Punjab for leave to try the suit. The order of the Chief Court treats the matter as having assumed the form of a suit. It directs the *plaint* to be returned to the *plaintiff*, with instructions to him to proceed in a Court of the North-Western Provinces. That order must have been passed with the concurrence of the High Court of the North-Western Provinces, otherwise the Chief Court could only have refused leave for the trial of the case by its own Subordinate Court. The order passed implies a transference of the record or change of venue. When the case went back to the Court of the Subordinate Judge of Meerut, it went back as a suit in which the plaintiff's pauperism had been established, ripe for the settlement of issues and for trial on the merits.

If, however, the finding of the Deputy Commissioner of Delhi was not binding on the Meerut Court, and the latter Court had to try the whole matter *de novo*, still, as the plaintiff was in fact a pauper both when he first presented his petition and also afterwards when with the money of friends he paid the Court-fees, his plaint when it was admitted should have been treated as filed on the date when it was originally presented as a petition. The appellant's application for leave to sue as a pauper being made *bona fide* and without fraud, it was inequitable and unjust that the mere payment by him of the Court-fees should have the effect of putting him out of Court on the plea of limitation. S. 308 of Act VIII of 1859 enacts that where the pauper's application is granted, his petition is to be deemed a plaint, but it does not enact that the petition shall not be deemed a plaint, if, pending the inquiry into his pauperism, the petitioner finds means to pay the Court-fees. The decision in *Seetaram Gour v. Goluk Nath Dutt* (1) was as applicable to a case like the present as to the case where leave is actually given to a petitioner to sue as a pauper; and the *Explanation* appended to s. 4, Act IX of 1871, was not

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(1) Marshall's Reports, 174.

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inconsistent with the view that the appellant's plaint was filed from the date when it was presented as a petition. His application was in fact a plaint, *plus* a request for leave to sue as a pauper, and although it became unnecessary for him to obtain that leave, the plaint was not abandoned. If the Courts below were right in their view, a person who, after presenting a petition for leave to sue as a pauper within the period of limitation, happened to succeed to property, might find himself disabled from proceeding.

Mr. *Leith*, Q.C., and Mr. *Doyne*, for the respondent.—The appellant's argument assumes that the Delhi Court had authority to determine that the appellant could sue as a pauper not merely in the Delhi Court but in the Courts of another Province. It was clear, however, that when the case came before it, the Meerut Court was entitled and bound to ascertain whether the appellant was a pauper or not. He might have been a pauper when before the Delhi Court, and yet no pauper when he came to Meerut. The authority of the Chief Court of the Punjab is only over its own subordinate Courts. It may forbid these to try a suit relating to lands partly within the jurisdiction. But no order of the Chief Court of the Panjab is binding on a Court subordinate to the High Court of the North-Western Provinces. The suit could not therefore be transferred from Delhi to Meerut by any order of the Chief Court of the Panjab. It might have been different if the High Court of the North-Western Provinces had intervened and directed a transfer in concurrence with the Chief Court. The case not having been transferred, the appellant, when he came back to the Meerut Court, must be taken to have commenced proceedings *de novo*, and as he withdrew his application for leave to sue as a pauper, that application could not become a plaint, since, under s. 308, Act VIII of 1859, it could only become a plaint upon the claim to sue as a pauper being admitted. The case was governed by s. 310 of the Act, which permits a fresh suit to be instituted. [SIR MONTAGUE SMITH.—The Courts have allowed the old plaint to stand, and yet say it is only to date from the payment of the stamp fees.] It is not a plaint until it is stamped. [SIR ROBERT COLLIER.—May it not be stamped *nunc pro tunc*? SIR MONTAGUE SMITH.—May not stamps be added as though it had been filed originally with too small a stamp?] A wholly unstamped plaint is not to be received.

Mr. *Mayne* in reply.—The suit was regularly transferred. If not, the Meerut Court had no jurisdiction to take it up without leave from the High Court of the North-Western Provinces. In that case the proceedings in the Meerut Court should be quashed as *coram non judice*, and the appellant allowed to begin again deducting the time occupied by the abortive proceedings. [SIR MONTAGUE SMITH.—It may be doubted whether, with reference to s. 13, Act VIII of 1859, the High Court and the Chief Court together have power to transfer a suit. The Act omits to provide such a power.] The finding of the Delhi Court makes the question of pauperism *res judicata*. [SIR MONTAGUE SMITH.—Not if this is a new suit. The question of pauperism is not a point in the cause; it is a mere matter of procedure.] S. 310 of Act VIII only applied where leave to sue had been refused. Here there was no refusal, and consequently no necessity to bring a fresh suit. The proceedings could properly be continued on the stamp fees being paid. The appellant's original application bore an eight-anna stamp, and under s. 31 of Act VIII of 1859 the stamp could be increased.

On the conclusion of the argument their Lordships' judgment was delivered by

SIR MONTAGUE E. SMITH.—The decision of this appeal is attended with considerable difficulty, since it presents a case which is not provided for by the Code of Civil Procedure. It becomes of importance to the parties, because the decision of the point of practice determines the question whether or no the Statute of Limitations is a bar to the claim of the plaintiff. The original petition was filed in the Court of the Subordinate Judge of Meerut on the 20th February 1873. The claim of the plaintiff was to a share of the property devised by the will of the late Colonel Skinner. His claim arose upon the death of his father, Major Skinner, which occurred on the 22nd April 1861. The petition set out all the particulars required in a plaint, and prayed that the plaintiff might be allowed to sue *in forma pauperis*. The claim embraced landed property which was situate partly within the jurisdiction of the High Court of the North-West Provinces and partly within the jurisdiction of the Chief Court of the Punjab. The Judge of Meerut,

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apparently of his own motion, rejected the petition, on the ground that the question of the plaintiff's pauperism could be more conveniently tried in the Punjab. The plaintiff thereupon filed it in the Court of the Deputy Commissioner of Delhi, and on the 14th April 1873 an order was made by that Court, after examining witnesses, admitting the plaintiff's suit *in forma pauperis*. Before proceeding further with the suit, the Deputy Commissioner applied to the Chief Court of the Punjab for authority to proceed under s. 13 of the Code of Civil Procedure. That section enacts: "If the districts within the limits of which the property is situate are subject to different Sudder Courts, the application shall be submitted to the Sudder Court to which the district in which the suit is brought is subject, and the Sudder Court to which such application is made may, with the concurrence of the Sudder Court to which the other district is subject, give authority to proceed with the same." On the 29th of May 1873 the Chief Court of the Punjab, presumably not without having consulted the High Court of Allahabad, directed that "the plaint should be returned to the plaintiff, with instructions that he should present it to some Court in the North-West Provinces." Accordingly the plaintiff took the proceedings back to the Court of Meerut from which he had been originally driven, and on the 19th July 1873 an order of the Subordinate Judge of Meerut was made: "That the case be brought on the file, and numbered." Their Lordships think it must be assumed that this order was complied with, and that the plaint was brought upon the file, and was numbered.

The first question which arises is, whether the finding of the Deputy Commissioner of Delhi, that the plaintiff was a pauper, can be imported into the suit when it found its way upon the file of the Court at Meerut, and that depends upon the construction to be given to sections 11, 12, and 13 of the Code of Civil Procedure. Undoubtedly, when a suit is in the position in which the present suit stood in the Court at Delhi, it would be convenient and proper when an application had been made by the Judge of the Delhi Court to the Chief Court of the Punjab, and that Court is required, before it acts, to consult the Judges of the High Court in the jurisdiction to which the plaint is to go, that those two Courts having consulted together should have power to direct that the cause

should be transferred in its then state to the Court to which they think it right and expedient that it should go. But the legislation stops short of enacting that it should be so transferred. What it enacts is that the Judge shall apply to the High Court to which he is subject for authority to proceed, and the Court to which such application is made may, with the concurrence of the other High Court, give authority to proceed. There is no express power to transfer. Their Lordships having come to the conclusion to decide the case in favour of the appellant upon another ground, do not desire unnecessarily to express an opinion upon this first point. There being a grave doubt, at the least, whether the two Courts have power to make the transfer, they think it would be a proper addition to be made to this section, that this power should be conferred upon them.

The other question which has been raised is as to the effect of the proceedings in the Court of Meerut, and whether the judgment of the High Court affirming that of the Subordinate Judge of Meerut is correct in holding that the suit is to be considered as instituted when the plaintiff paid the amount of the stamps into Court, and that the petition was converted into a plaint from that time only.

In order to explain the view their Lordships have taken of this point, it will be necessary to refer to some of the proceedings. The order of the 19th July 1873 directing the case to be put on the file and numbered has been already adverted to. When that was done the defendants put in written statements objecting that the plaintiff ought to establish his position as a pauper in the Meerut Court, treating what had taken place at Delhi as irrelevant, and upon these statements, on the 10th November 1873, the Subordinate Judge of Meerut directed that the case could not be heard, and rejected the plaint. There was an appeal to the High Court from that decision, and on the 10th July 1874 the High Court held that the time of the abortive proceedings at Delhi should be deducted from the period of limitation, and "remanded the suit" to the Subordinate Judge, directing him to proceed with it. That being so, proceedings were taken by him with a view to an inquiry into the pauperism of the plaintiff. Issues were framed, and a day was fixed for the trial of those issues; the day so fixed

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was the 27th November 1874. On that day the plaintiff presented a petition praying for leave to deposit the amount of the stamps, alleging that he had succeeded in negotiating a loan for a sum of money sufficient to cover the amount of the institution stamps. It appears that on the same day, having obtained the permission of the Subordinate Judge, the plaintiff paid the proper stamps into Court. That having been done, the defendants raised two objections; first, that the suit ought not to proceed, because the plaintiff had fraudulently applied to be made a pauper when he had property; and secondly, that the suit should be regarded as instituted on the date the Court-fee was paid, which was beyond the period of limitation. The Subordinate Judge went into evidence on the first issue, and found that there had been no fraud on the part of the plaintiff in filing a petition to be allowed to sue as a pauper, and therefore it must now be taken that that petition was filed *bonâ fide*, and without fraud. On the other point the Judge held in effect that he saw no reason why, upon payment of the fee, the suit should not be deemed to be instituted on the day "which the pauper admittance would have carried," and added: "The Court, then, would allow the case to proceed on its present basis, but at the same time would suggest to the defendants the advisability of appealing to the High Court to determine whether, by the substitution of the institution fee, the case is to be deemed a plaint and deemed to be filed on the day on which the application to sue *in formâ pauperis* was originally submitted." The Judge then directed that the application should be numbered and registered, and be deemed the plaint in the suit, and that a day be fixed for the settlement of issues. This was the first opinion of the Subordinate Judge, but he appears afterwards to have resiled from it, and to have framed issues, two of them raising the questions which are now before their Lordships for decision. First—"Can an 'application' to be allowed to sue *in formâ pauperis* be converted into a 'suit' as between parties at any subsequent date by filing the institution fee, and in the latter instance, from what date should the institution of suit be calculated; the second, "Is the suit barred by efflux of time?" Three other issues were settled as to the merits of the case, and the Judge, after settling these issues, examined witnesses. On the 6th July 1875 he gave judgment. Having referred to the dates of the application to sue *in formâ pauperis*, and to

some of the other dates of the proceedings, he says: "The granting of the application, then, constitutes an essential ingredient to further progress, as an ordinary suit with the privilege of limitation counting from the day the petition to sue *in formâ pauperis* was presented, and not from the date when it was registered under s. 308. But it will be seen that prior to the application to sue *in formâ pauperis* being granted and whilst the question was still under inquiry and investigation, the plaintiff has converted the matter into a regular suit, the consequence of which is that he has by his own act given up the advantages or disadvantages (as the case might be) of the position he may have become possessed of. By such act the pauper application died a natural death, and by the conversion the regular suit came into operation on its own individual and inherent basis from date of such conversion, and as a consequence, in computing limitation, the computation must be made from date of such conversion, which places the plaintiff out of Court." No doubt, if the Judge is right, the plaintiff would be barred by the Statute of Limitations, and the plaint would be properly rejected. There was an appeal from that decision to the High Court, which affirmed it. The following passage of their judgment gives the view of the High Court on the question: "But there is no provision in the law which allows the application presented under s. 299 of the Code to be deemed the plaint in the suit when such application has been in effect revoked and superseded by the payment of the fees chargeable under the Court-Fees Act. In such a case we conceive that the date of the presentation of the plaint and institution of the suit must be taken to be the date of the payment of the fees." The High Court does not decide that the plaint ought to be rejected altogether. It seems to consider that the petition should be retained as a plaint, but that it should be taken to be converted into a plaint only from the day when those fees were paid.

Now a petition to sue *in formâ pauperis* contains all that a plaint is required to do. By s. 300 "the petition shall contain the particulars required by section 26 of this Act in regard to plaints, and shall have annexed to it a schedule of any moveable or immoveable property belonging to the petitioner, with the estimated value thereof, and shall be subscribed and verified in the manner

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"hereinbefore prescribed for the subscription and verification of "plaints." Therefore it contains in itself all the particulars the statute requires in a plaint, and, *plus* these, a prayer that the plaintiff may be allowed to sue *in formâ pauperis*.

The Act provides what shall happen if the prayer of the petition be granted by s. 308. It also provides by s. 310 what shall be the effect of a rejection of the petition. But this case is one which the statute has not in terms provided for. The intention of the statute evidently was that, unless the petition was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one. Then what are the facts in this case? The petition is filed, and proceedings are taken to inquire into the pauperism, which are delayed by various orders of the Court, after the plaintiff had been already bandied about from one Court to another until a very considerable period of time has elapsed. Then, pending that inquiry, the plaintiff by paying the amount of stamp fees into Court admits that he is no longer desirous to sue as a pauper, and gives up so much of the prayer of his petition as asks to be allowed so to sue, but no more. The defendant, so far from being a sufferer by that change, is benefited, as both parties will go on with the litigation on equal terms. Is there, then, anything in the Act which requires that in such a state of things the petition of plaint shall be rejected altogether, and the plaintiff be compelled to commence *de novo*? Their Lordships do not see their way to the middle course followed by the Court in holding that the petition was converted into a plaint from the date of the payment of the fees. To be logical, the Court should have rejected it altogether. The petition of plaint was placed upon the file and numbered on the 19th July 1873, and this is the plaint that is allowed to go on. Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it.

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This case, which is not provided for by the Act, approaches more nearly to the state of things contemplated by s. 308 than that contemplated by s. 310. There are no negative words in the Act requiring the rejection of the plaint under circumstances like the present, nor anything in its enactments which would oblige their Lordships to say that this petition, which contains all the requisites which the statute requires for a plaint, should not, when the money has been paid for the fees, be considered as a plaint from the date that it was filed. It is obvious that very great injustice might be done if this were not to be the practice. There could hardly be a stronger instance of the mischief which might arise than what would have happened in this case. Their Lordships of course say nothing about the merits of the case. The claim may be utterly untenable, but on the assumption that the claim is a good one, nothing more unjust to the plaintiff could have happened than that he should have been deprived, by having done an act which is in itself meritorious, of the benefit which he would have had if he had been found to be a pauper. He was a pauper when his petition was filed. Supposing there had been any fraud found by the Judge, the consideration which would determine the judgment would then have been different.

Their Lordships have only to advert to the Statute of Limitations, Act IX of 1871. Their Lordships think that their decision is in no way inconsistent with this Act. The explanation in section 4 is this: "A suit is instituted in ordinary cases when the plaint is presented to the proper officer; in the case of a pauper when his application for leave to sue as a pauper is filed." In their view the petition to sue as a pauper became a plaint, and under this statute the suit must be deemed to be instituted when that application was filed.

In the result their Lordships will humbly advise Her Majesty to reverse both the decisions below, and to remand the case for trial on the merits. The respondents must pay the costs of the appeal.

Agent for the Appellant: Mr. *T. L. Wilson*.

Agents for the Respondents: Messrs. *Young, Jackson, and Beard*.

## APPELLATE CIVIL.

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March 25.*Before Mr. Justice Pearson and Mr. Justice Oldfield.***RAGHU NATH DAS (PLAINTIFF) v. ASHRAF HUSAIN KHAN AND ANOTHER (DEFENDANTS).\****Act X of 1877 (Civil Procedure Code), s. 111—Set-off—Mortgage.*

The usufructuary mortgagee of certain land sued the mortgagor for the money due under the mortgage. The mortgagor alleged that the mortgagee had committed waste and was liable to him for compensation which he claimed to set-off. *Held* that under s. 111 of Act X of 1877 the amount of such compensation could not be set-off.

THE facts of this case, so far as they are material for the purposes of this report, were as follows: On the 12th September 1869 Ashraf Hussain Khan and Sharif-un-nissa, who each owned a certain share in a garden, jointly gave Hingan Lal a usufructuary mortgage of their shares for a term of five years. Hingan Lal's interests under this mortgage were sold in the execution of a decree, and were purchased by Raghu Nath Das, who in January 1878 sued Ashraf Hussain Khan and Sharif-un-nissa, the term of the mortgage having expired, to recover Rs. 569-4-0, the money due under the mortgage. The defendants claimed to set-off their shares of a sum of Rs. 1,161-1-4, being the value of certain trees which they alleged had existed in the garden, and which Hingan Lal had either cut down or destroyed, and of the materials of certain buildings which they alleged had existed in the garden, and which Hingan Lal had pulled down and sold the materials of. The Court of first instance, in giving the plaintiff a decree, allowed the defendants a set-off of Rs. 275 on account of the acts of waste committed by Hingan Lal. On appeal by the plaintiff the lower appellate Court held that the defendants were entitled to a set-off on such account, but reduced the amount to Rs. 150.

The plaintiff appealed to the High Court, contending that the set-off claimed by the defendants could not be allowed.

The *Senior Government Pleader (Lala Juala Prasad)* and *Munshi Hanuman Prasad*, for the appellant.

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\* Second Appeal, No. 1031 of 1878, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Benares, dated the 9th September 1878, modifying a decree of Babu Parmoda Charn Banarji, Munsif of Benares, dated the 22nd June 1878.

Mir. Akbar Husain, for the respondents.

The judgment of the Court, so far as it related to the above contention, was as follows :

JUDGMENT.—We are of opinion that the plaintiff's objection to the set-off allowed by the Courts below is valid. Under s. 111, Act X of 1877, it is only an ascertained sum of money legally recoverable that can be the subject of set-off, and it is necessary that in such claim both parties fill the same character as they fill in the plaintiff's suit, the claim must be certain and determinate and actually due and in the same right and of the same kind. The claim by the defendants in this suit, for estimated damages to property mortgaged as security for money lent, does not meet the requirements of the law, so as to be capable of being set-off against the plaintiff's claim for the money lent.

It has been held that mesne profits is in the nature of damages and is not a debt so as to form a subject of set-off (1) ; and it was held in a suit by a carrier for the price of the carriage of goods the defendant cannot set-off the amount of damages claimed against the plaintiff for injury to the goods, but must sue to recover the damage in a separate suit (2). We must therefore allow the plaintiff's appeal.

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## APPELLATE CRIMINAL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

EMPRESS OF INDIA v. BALDEO SAHAI.

1879

April 7.

*Attempt to obtain an Illegal Gratification—Act XLV of 1860 (Penal Code), s. 161—Act X of 1872 (Criminal Procedure Code), ss. 218, 351—Warrant case—Defence—Right of accused person to cross-examine the witnesses for the prosecution—Power of the Court to summon material witness.*

To ask for a bribe is an attempt to obtain one and a bribe may be asked for as effectually in implicit as in explicit terms.

Where, therefore, B, who was employed as a clerk in the Pension Department, in an interview with A, who was an applicant for a pension, after referring to his own influence in that department and instancing two cases in which by that influence increased pensions had been obtained, proceeded to intimate that anything might be effected by "kar-rawai," and on the overture being rejected, concluded by declaring that A would rue and

(1) *Ruteerummom Opadhya v. Grijanund Opadhya*, 7 Wym. Rep., 218.

(2) *Scanlan v. Herrold*, 10 W. R., 295.



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repent the rejection of it, *held* that the offence of attempting to obtain a bribe was consummated.

The charge having been read to the accused person he stated his defence to the same, upon which the Magistrate, the witnesses for the prosecution being in attendance, called upon the accused to cross-examine them. The accused refused to do so until he had examined the witnesses for the defence who were not in attendance. The Magistrate then discharged the witnesses for the prosecution and adjourned the trial for the production of the witnesses for the defence.

*Held, per SPANKIE, J.*, that the accused was not entitled to have the witnesses for the prosecution summoned, in order that they might be cross-examined by the accused, on the date fixed for the examination of the witnesses for the defence.

*Held also per SPANKIE, J.*, that the Magistrate was empowered to record both oral and documentary evidence after the witnesses for the defence had been examined.

THIS was an appeal to the High Court by the Local Government against a judgment of acquittal by Mr. H. Lushington, Sessions Judge of Allahabad, dated the 22nd November 1878. One Baldeo Sahai was convicted by Mr. J. B. Thomson, Magistrate of the first class, on the 16th September 1878, under s. 161 of the Indian Penal Code, of attempting to obtain an illegal gratification. On appeal Baldeo Sahai was acquitted by the Sessions Judge, the Judge holding that the acts of the accused were not acts committed towards the commission of the offence of attempting to obtain an illegal gratification, but acts preparatory towards the commission of such offence, and that consequently the accused could not be convicted of such offence. The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown.

Mr. Colvin and Mr. L. Dillon, for Baldeo Sahai.

The following judgments were delivered by the Court:

SPANKIE, J.—The accused was charged that he on or about the 30th July 1878, being a public servant, attempted to obtain from Abbas Ali, for himself, a gratification other than legal remuneration, as a motive or reward for showing favour in the exercise of his official functions, and thereby with having committed an offence punishable under s. 161 of the Indian Penal Code.

If we accept the evidence of Abbas Ali, it is clear that he at least quite understood that Baldeo Sahai had expressed every readiness to use his influence in his (Abbas Ali's) favour provided that he was paid for doing so. I felt some difficulty at first when I considered the case whether "an attempt to obtain" an illegal gratification had been made out. But I am satisfied that not only was the intent to commit the offence defined in s. 161 of the Penal Code present in the mind of Baldeo Sahai, and for some time too, but that he made preparations to do so, and when these preparations and his plans were ripe, he attempted to carry out his intention. It is shown in evidence that the grant of a pension to Abbas Ali was received in the Accountant-General's Office on the 15th June. But an anonymous letter had reached the office, suggesting that there had been breaks in Abbas Ali's service and great care should be taken in passing his pension; that the Assistant Accountant-General in charge of the Pension Department directed that the "permanent payable order" should be issued, that he took no notice of the letter because it was anonymous; and that he made over the file to Baldeo Sahai, who is a clerk in the pension pay department, to carry out his orders.

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It is also shown that the Government of the North-Western Provinces had sanctioned the pension on the 12th June 1878. It is also shown that the file was made over, as stated above, on the 14th August or thereabouts by Mr. Carnac after the objections of the Deputy Accountant-General to the pension had been considered by the Local Government and overruled, so that Baldeo Sahai must have been fully aware that no further objections to its payment would be entertained. When Abbas Ali first saw Baldeo Sahai, which I agree with Mr. Thomson must have been about the middle of August, he was told by Baldeo Sahai that an anonymous petition had been received objecting to the pension; that from what was written he was afraid that there would be a fuss about it; that Biss Sahib had raised several objections, and a report had been prepared that Rs. 25 a month in excess of the proper pension had been sanctioned, and Baldeo Sahai promised next day to show Abbas Ali the petition. The next day Abbas Ali met Baldeo Sahai near the Accountant-General's Office with the file in his hand and drove him home. It was evening, and Baldeo Sahai said that

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it was too late, he had better come the next morning, and "I will show you the letter."

So far Baldeo Sahai had made his preparations for carrying out his previously conceived plans and intention. He had also stimulated the curiosity of Abbas Ali and excited his fears by the false assertion that there were still difficulties in the way of his getting the full pension already sanctioned. The next day at 8 A.M. Baldeo Sahai showed the anonymous petition and told Abbas Ali of two pension cases which had been carried through by him. In one instance he had obtained half pay instead of one-third as pension for Mirza Ali, and in the other he had increased the pension of Ali Bakhsh Khan to Rs. 400 a month. There can be no doubt that, if this evidence be true, this statement of his successful efforts to secure better pensions for persons was meant to act upon Abbas Ali and induce him to follow the lead which Baldeo Sahai was now bent upon giving to him. He now begins what may be called business and what I think constitutes an attempt on his part to obtain a gratuity from Abbas Ali (1). The intention had been conceived, the plans had been matured, and all preparations made, and though no specific sum had been asked for, the transaction had so far advanced, that Abbas Ali had thoroughly understood what was being done, and put a stop to what might have been successful, if he had not refused to enter into any arrangement and intimated to him, that he "would not give him anything." That Baldeo Sahai understood that his attempt had failed is clear from his declaration, "You will rue and repent it." If Baldeo Sahai had found a willing listener, there can be no reasonable doubt that his offer to arrange the business, if Abbas Ali wished it, in the manner suggested by "*kar-rawai*," which he understood to be the giving and taking of money, would have been accepted. Not only would Baldeo Sahai have succeeded in his attempt to obtain a gratuity, but he would have caused Abbas Ali to commit an offence punishable

(1) "He (Baldeo Sahai) said that the office was a large one, much authority was vested in him, and by such *kar-rawai* (i.e., I supposed giving and taking money) such things were effected: I gave him to understand that nothing of that need be expected from me; that as the report had been written which he had shown me, he could have no power

in the matter: he then said that the office was a large one, if I wished it, everything might be accomplished: I said I did not wish to do anything of the nature of the '*kar-rawai*' he wished, that is, I intimated to him I would not give him anything: as I left he said you will rue and repent it."

under s. 116 of the Penal Code. I think therefore that there can be no doubt that, if the evidence be true, the offence charged under s. 161 of the Code against the accused has been made out.

On the merits I entertain no doubt of the accused's guilt. I fully accepted Mr. Thomson's judgment in this respect. It is full and exhaustive, and deals with all the apparent difficulties, such as contradictory statements and discrepancies. The accused in no way made out his defence that he was the victim of a conspiracy on the part of the office hands organized by the head of his office, and so far from Abbas Ali being eager to secure the punishment of Baldeo Sahai, there is proof on the record that he did not wish that there should be any criminal charge. He from the first stated to the Deputy Commissioner at Lucknow that he wished no notice to be taken of his complaint. If he could have got his pension order made out, he would have been quite content.

An objection was taken by Baldeo Sahai's counsel that the Magistrate had contravened a ruling of this Court and had refused to summon the complainant in order that he might be cross-examined on the day fixed for hearing the defence. The law as laid down in s. 218 of the Criminal Procedure Code is: "If the accused person have any defence to make to the charge, he shall be called upon to enter upon the same and to produce his witnesses if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution." It appears from an order by the Magistrate dated the 4th September, after hearing the defence, that accused's pleader was offered an opportunity under s. 218 of cross-examining the witnesses. The pleader refused to cross-examine them and said that he would apply to the Court after he had examined his witnesses. The Magistrate held that he could not do this. The accused at that time had no witnesses in attendance. The case was adjourned and the witnesses were summoned. The ruling (1) cited by the respondent's counsel did not determine the point whether, if the Magistrate before granting an adjournment called upon the accused to exercise his right of recalling the witnesses for the prosecution, and the accused refused to do so at that time, the Magistrate would thereupon

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(1) *Queen v. Lal Mahomed*, H. C. R., N.-W. P., 1874, p. 284.

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be at liberty to discharge the witnesses for the prosecution. This point the learned Judge expressly said "need not now be determined" in the case before him. In the same volume with the ruling referred to is another (1) by Mr. Justice Pearson in which it is laid down that the section does not say that accused shall only be allowed to recall and cross-examine the witnesses for the prosecution, provided that he expresses his wish to do so at the time when he is called upon to make his defence, and provided that these witnesses be still in attendance in the Court and do not require to be re-summoned. The plain meaning and intention of the section was to allow him the right in question at any time while he is engaged in his defence and before his trial is concluded. The object of the section is clearly to secure the accused the opportunity of cross-examining the witnesses for the prosecution after he has been informed as to the nature of the specific charge which he is required to answer. Until he knows this he is not in a position to decide on what points the evidence for the prosecution is material. If this opportunity be secured, I do not apprehend that he has any further right of re-calling the witnesses. If the witnesses for the defence are in attendance, they are to be examined, and after that the accused shall be allowed to recall and cross-examine the witnesses for the prosecution. But if the witnesses for the defence were not in attendance, the accused would still be at liberty to recall the witnesses for the prosecution. If he refuses to exercise this right *after he has entered on his defence*, he cannot, I think, demand as a right the recall of the witnesses for the prosecution, if the case be adjourned because he has not produced his witnesses. He has had the opportunity intended by the section. What his own witnesses may say can have little or no bearing on the cross-examination of the witnesses for the prosecution who are called to support the charge, but not to refuse the evidence for the defence. There is also a second objection that the Magistrate acted illegally and against the practice of the Criminal Courts, inasmuch as he recorded evidence for the prosecution, both oral and documentary, after the case for the defence had been closed. S. 351 of the Criminal Procedure Code, however, gives the Magistrate power to summon any witness at any stage of any proceeding, inquiry or trial, if the

(1) *Queen v. Lal Singh*, H. C. R., N.-W. P., 1874, p. 270.

evidence of such person appears essential to the just decision of the case. "Trial includes the punishment of the offender" (s. 4), so I see no valid objection to the course adopted by the Magistrate. The trial had not closed until he had sentenced the accused, if convicted.

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In conclusion I may state that the sentence passed was, in my judgment, too lenient for the offence committed. I now find that my honorable colleague proposes to increase the amount of punishment by a fine, in which proposal I quite agree with him.

PEARSON, J.—I concur with my honorable colleague in the opinion that, for the reasons set forth in the Joint Magistrate's able and well-considered judgment, the evidence of Abbas Ali is substantially trustworthy, and that it convicts the accused of an offence punishable under s. 161, Indian Penal Code. Nor does it appear to me that the Joint Magistrate's procedure is obnoxious to material objections. The view of the Sessions Judge, that "the accused has not committed any act towards the commission of the offence," and that "all that he has done is only preparatory to the commission of the offence," is erroneous. It may be that the accused in sending for Abbas Ali and showing him the anonymous petition and exhibit B and making him aware of their contents was only paving the way for the commission of the offence in question. But when, after referring to his own influence in the office and instancing two cases in which by that influence increased pensions had been obtained, he proceeded to intimate that anything might be effected by *kar-rawai*, and on the overture being rejected, concluded by declaring that Abbas Ali would rue and repent the rejection of it, the accused was actually offering inducements for the purpose of obtaining a bribe. To ask for a bribe is an attempt to obtain one; and a bribe may be asked for as effectually in implicit as explicit terms. As soon as he had caused Abbas Ali to understand that he was willing to render him a service for a bribe, the offence of attempting to obtain a bribe was consummated, and the Sessions Judge is wrong in holding that it was not consummated, but that the accused might have foregone his intention of committing it. The punishment awarded by the Joint Magistrate's sentence is, however, scarcely adequate to the offence.

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I would, therefore, set aside the order passed by the Sessions Court in appeal, and restore the finding and sentence of the Court of the Joint Magistrate with this modification, that, in addition to the punishment awarded by the sentence, the criminal Baldeo Sahai pay a fine of Rs. 200, or in default of payment undergo a further imprisonment for six months.

*Appeal allowed.*

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 April 10.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

EMPRESS OF INDIA v. ASGHAR ALI AND OTHERS.

*Evidence of Accomplice—Confession by Accused person—Act X of 1872 (Criminal Procedure Code), ss. 344, 345, 347—Act I of 1872 (Evidence Act), s. 24—Pardon.*

Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences none of which were exclusively triable by the Court of Session, and such person was examined as a witness in the case, *held* that, the tender of pardon to such person not being warranted by s. 347 of Act X of 1872, he could not legally be examined on oath, and his evidence was inadmissible.

*Held* also, that the statement made by such person was irrelevant and inadmissible as a confession, with reference to s. 344 of Act X of 1872 and s. 24 of Act I of 1872.

THIS was an appeal to the High Court by Asghar Ali, Hamid-ud-din, and Achal Behari, from convictions by Mr. W. Duthoit, Sessions Judge of Sháhjahánpur, dated the 16th November 1878. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court. On behalf of all the appellants it was contended that the statement made on the trial of the appellants by the witness Irtiza Ali was not admissible as evidence against the appellants, and that, such statement being rejected, there was no evidence remaining which would justify the convictions of the appellants.

Mr. Colvin for Asghar Ali and Hamid-ud-din, and Mr. Leach and Babu Dwarka Nath Mukarji for Achal Behari.

The Junior Government Pleader (Babu Dwarka Nath Banerji) for the Crown.

The Court (PEARSON, J., and OLDFIELD, J.) delivered the following

**JUDGMENT.**—The appellants have been convicted by the Sessions Judge of offences under ss. 261, 262, 409, 411, and 414, of the Indian Penal Code, in connection with certain stamp frauds in the Civil Courts of Sháhjahánpur. Asghar Ali is the deputy record-keeper of the Judge's Court. Hamid-ud-din is the decree-writer, and Achal Behari is a literate chaprasi in the Court of the Sháhjahánpur Munsifi. The appellants, together with Irtiza Ali Khan, a copyist in the Judge's office, and four others, were sent up by the police to the Magistrate on charges under ss. 411 and 379, and in the course of the inquiry the Magistrate offered a pardon to Irtiza Ali Khan and admitted him to be a witness for the prosecution. The Magistrate finally committed four of the accused to the Sessions on charges under ss. 261, 263, 109 and 263, 409, 411. In the course of the trial an objection was preferred on their behalf to the Judge to the admission of the evidence of Irtiza Ali Khan, but was disallowed and his evidence was admitted.

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The case for the prosecution is that it was part of Achal Behari's business under orders from the Munsarim to punch the stamps on plaints presented, and of Hamid-ud-din to punch them the second time; that Achal Behari instead of punching them removed the unobliterated stamps and replaced them with old stamps that had been once punched supplied by Hamid-ud-din, who in his turn removed once-punched stamps from plaints passing through his hands, replacing them with twice-punched stamps obtained from the record office and taken from old records, such stamps being in their turn replaced by low value stamps from B. files. In brief it was Achal Behari who stole the fresh stamps, and the others assisted in concealing the fraud by a concerted plan of tampering with the stamps in the records, and that the spoil obtained by the sale of the stolen stamps was divided among them.

The fact that the stamps have been taken off the plaints and the records tampered with appears placed beyond doubt, but the objection taken on behalf of the appellants is that the evidence of the approver is inadmissible, and that apart from it there is no sufficient evidence on which the appellants can be convicted of being concerned in the frauds.



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These objections are in our opinion valid. The Magistrate is empowered to tender a pardon to an accused person with a view to examine him as a witness for the prosecution against other persons charged at the same time with him for an offence, in the manner and in the cases specified in s. 347 of the Code of Criminal Procedure, that is, "after recording his reason he may tender a pardon to any one of the persons supposed to have been directly or indirectly concerned in or privy to any offence specified in column 7 of the fourth schedule annexed as triable exclusively by the Court of Session."

In the present case the Magistrate omitted to record his reason for tendering a pardon to Irtiza Ali Khan, and none of the accused before him were charged with any offence exclusively triable by a Court of Session, and we have no ground for inferring that Irtiza Ali Khan was supposed to have been directly or indirectly concerned in or privy to such an offence, and, therefore, the offer of a pardon to him and his examination as a witness by the Magistrate and Judge were illegal and not authorised by s. 347. This examination as a witness not being permissible under s. 347 was contrary to express law.

After the offer to him of a pardon he was under the provisions of s. 347 detained in custody pending the termination of the trial, and his position as one under accusation of an offence was in no way changed when he appeared before the Judge, and could not be altered until he had been discharged, acquitted, or convicted, and with reference to the express provisions of s. 345, being an accused person, so long as he was in that position he could not be put on his oath or examined as a witness in the case in which he was accused.

His statement is also irrelevant and inadmissible with reference to s. 344, Criminal Procedure Code, and s. 24, Evidence Act. The evidence of Irtiza Ali Khan is therefore absolutely inadmissible.

There is a decision by the Bombay High Court (1) quite in point and to a similar effect, and another by the same Court under the old Criminal Procedure Code, where evidence taken illegally under s. 209 of that Code on an offer of pardon was rejected (2).

(1) *Reg. v. Hanmanta*, I. L. R., 1 Bom., 610.

(2) *Reg. v. Remedios*, 3 Bom. H. C. Rep., Cr. C., 69.

The case referred to by the Sessions Judge (1) is not in point, for in that case the prisoner had been discharged by the Magistrate for want of evidence and does not appear to have been offered a pardon. We may add that the statements of Irtiza Ali Khan are exceptionally untrustworthy, for he is believed by the Magistrate and the Judge to have fabricated false evidence against some of those whom he accused, and on this ground we should reject his statements against the appellants unless distinctly corroborated as against them which we do not find to be the case.

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Setting aside the evidence of the accomplice, there is nothing against the prisoners but bare suspicion arising out of the positions they held and opportunities they had of access to the records. On two occasions some old stamps were found, in Asghar Ali's house once, and on another occasion hidden under the carpet where Nur Ali, a relation of the record-keeper, was sitting, but the Courts below suspected that these stamps were placed by Irtiza Ali Khan in the place where they were found. As to any opportunities the appellants may have had of getting at the stamps on the plaints and records, it is clear that Hamid-ud-din and Achal Behari were not the only persons through whose hands the records passed, and others besides them had access to them in the Munsif's Court, and these persons have one point in their favour, that the record-keeper of the Judge's Court gave receipts for the records, and they may say, with some show of reason, that the receipts would not have been given if the records had been tampered with. Nor was Asghar Ali the only person in the record office who had access to the records, and indeed it is admitted that many other persons must have been engaged in the frauds.

There is nothing therefore to fix the guilt on any of the appellants, and indeed the counsel for the prosecution was unable to support the conviction on other evidence than that of the approver, whose testimony we have rejected. We set aside the convictions and direct the release of the prisoners.

*Convictions quashed.*

(1) *Queen v. Behari Lal Bose*, 7 W. R., Cr. 44.

## APPELLATE CIVIL.

1879

April 15.

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

SHIB GOPAL AND OTHERS (DEFENDANTS) *v.* BALDEO SAHAI  
(PLAINTIFF).\*

*Act X of 1877 (Civil Procedure Code), s. 32—Dismissal or Addition of Parties—Revenue Court, Power of—Act XVIII of 1873 (N.-W. P. Rent Act), s. 106.*

*B* and *N*, the mortgagees of a mahal, granted the mortgagors a lease of the mahal, the mortgagors agreeing to pay "the mortgagees" a certain rent half yearly "on account of the right they held in equal shares," and that in default of payment of such rent, "the mortgagees" should be entitled to sue for payment. The mortgagors having made default in payment of the rent, and *N* refusing to join in a suit against the mortgagors to enforce payment, *B* sued them alone for a moiety of the rent due. The Revenue Court of first instance held, with reference to s. 106 of Act XVIII of 1873, that *B* could not sue separately. Held by the High Court that the order of the Revenue Court of first appeal directing, *inter alia*, that the Court of first instance should retry the suit after making *N* a defendant in the suit was not illegal, notwithstanding that the provisions of s. 32 of Act X of 1877 were not made applicable to the procedure of the Revenue Courts by Act XVIII of 1873.

Held *per SPANKIE, J.*, that s. 106 of Act XVIII of 1873 did not apply, and *B* was entitled separately to sue for the whole of the rent.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

Pandit *Nand Lal*, for the appellants.

Babu *Oprokash Chunder Mukerji*, for the respondent.

The following judgments were delivered by the High Court:

PEARSON, J.—If s. 32 of Act X of 1877 had been declared to be applicable to the procedure of Revenue Courts, the lower appellate Court's order would have been fully warranted by the terms of its second clause. Merely by reason of the absence of any such declaration, or of similar provisions in the Rent Act of 1873, I am not prepared to hold the order to be illegal. It is a reasonable, equitable order, consonant to judicial practice, conducive to the ends of justice, and not repugnant to anything in Act XVIII of 1873. I would dismiss the appeal with costs.

\* Appeal, No. 60 of 1878, from an order of R. M. King, Esq., Judge of Meerut, dated the 28th May 1878.

SPANKIE, J.—The plaintiff is a joint mortgagee of the shares of the defendants, the mortgagors, in an undivided estate. The mortgagees leased the estate to the mortgagors, taking from them a counterpart of lease dated 24th April 1877, the date apparently of the mortgage. By the terms of the lease the mortgagors were to pay Rs. 357 to the mortgagees, half at the *kharif* and half at the *rabi* yearly, on account of the right they held in equal shares. The suit is brought by one mortgagee for half the rent due in respect of 1283 fasli and 1284 fasli. The defendants contend that plaintiff is a co-sharer in an undivided estate, and has never collected rent separately: he is barred from suing separately by s. 106 of Act XVIII of 1873.

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The Assistant Collector holds that the case turns on the terms of the counterpart of the lease: this document recites that defendants take over from Mangat Rai and Baldeo Sahai certain lands, whereof Mangat Rai and Baldeo Sahai are possessed in equal shares, in consideration of the payment of Rs. 357 yearly, the former being liable for the Government demand: beyond these words there is no separation of the mortgagees: their relation to the farmers is a joint one: no one of them, the Assistant Collector holds, can sue for a share under a division which may obtain as between the mortgagees themselves: the plaint was informal and the suit must be dismissed.

In appeal the Judge considered that the plaintiff could get no redress unless the Court exercised its powers under s. 32 of Act X of 1877. "This being so," the Judge adds, "I think the Rent Court should have exercised its powers, and so conduced to the redress of what is certainly an injury suffered by the plaintiff, *vis.*, the non-realisation of his rent." He, therefore, remanded the case with direction that the plaintiff should have leave to amend his plaint, to pay additional institution fee, and request the Court to make Mangat Rai a co-defendant.

It is contended in second appeal that s. 106 of Act XVIII of 1873 bars the suit: the direction under s. 32 of Act X of 1877 to the first Court to amend the plaint and make Mangat Rai a party to the suit is wrong in law, as that section is expressly limited to the first hearing of the suit.

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S. 32 of Act X of 1877 operates in two ways. The Court on or before the first hearing, upon the application of either party, may order the name of any party, whether as plaintiff or as defendant, improperly joined, to be struck out; and it may at any time either upon or without such application, and on such terms as it thinks just, order any plaintiff to be made a defendant, or that any defendant may be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. So that if s. 32 of the Act could be applied to the case before us, the objection taken by the appellant fails. No person, however, can be added as a plaintiff without his own consent thereto.

The present Rent Act, except so far as ss. 84, 148, 179 and 210 are concerned, has made no provision for adding parties. Nor did Act X of 1859 do so, except under ss. 77 and 140. But the Courts heretofore have always held themselves at liberty to exercise the power vested in them under s. 73 of Act VIII of 1859 in such cases as the one before us. The order of the Judge, I agree with my honorable and learned colleague, is one that is equitable and not repugnant to Act XVIII of 1873, whilst it is consonant to judicial practice and the ends of justice. In this particular case the plaintiff could have no redress unless he made the co-mortgagee a defendant in the suit. It is stated in the plaint that Mangat Rai had been invited to join in the suit and that he refused, being in league with the defendants. The plaintiff sent a registered letter to him asking him to join in the suit, but got no reply. Therefore the plaintiff was compelled to sue for his half share. If, however, s. 106 of the Rent Act applies to this case, the plaintiff should be instructed to sue for the entire share due, making the co-mortgagee a co-defendant. I, however, do not regard s. 106 as in any way operating to bar the suit. The property referred to in s. 106 is an undivided landed estate, and the co-sharer is the co-sharer in that estate, which is still the property of the mortgagors. It is true that the mortgagees represent the mortgagors as being in temporary proprietary possession of the property, but it is not in the character of a co-sharer in an undivided property that the plaintiff brought

this suit. On the contrary, the terms of the lease show that though the mortgage was made to Baldeo Sahai and Magnat Rai, their shares in the mortgage were recognised by the mortgagors. Their shares were equal. It is true that it was provided that in case of default the mortgagees might bring a suit and realise the amount due. But there is the recognition by the lessees that under the terms of the mortgage-deed the plaintiff is entitled to half the sum payable under the lease, and on this account I think that the plaintiff was entitled to sue for his share of it. It may, however, be more strictly regular that he should sue for the whole sum due, making his co-mortgagee a defendant; and if this is the course which the lower appellate Court is pursuing, for his order is not very clear, I concur with Mr. Justice Pearson, and would dismiss the appeal with costs.

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v.  
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SAHAI.

*Appeal dismissed.*

### FULL BENCH.

*Before Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.*

CHAMAILI KUAR (DEFENDANT) v. RAM PRASAD (PLAINTIFF).\*

1879  
April 16.

*Hindu Law—Power of the Father to alienate Ancestral property.*

*F*, during the minority of his son *R*, sold in order to raise money for immoral purposes, the ancestral property of the family. The purchaser acted in good faith and gave value for such property. *Held* by the majority of the Full Bench (SPANKIE, J., and OLDFIELD, J.), in a suit by *R* against the purchaser and *F* to recover such property and to have such sale set aside as invalid under Hindu law, that such sale was not valid even to that extent of *F*'s share, and that *R* was entitled to recover such property as joint family property. *Held per* PEARSON, J., that *R* could not recover such property, and that the purchaser, having acted in good faith, took by the sale *F*'s share in such property, and might have such share ascertained by partition.

THE plaintiff in this suit claimed to recover the possession of certain immoveable property, and to have a sale of such property, dated the 30th December 1859, made by his father, Fateh Chand, set aside. He made his father a defendant in the suit, and he sued on the allegation that the sale was invalid, the property

\* Second Appeal, No. 1068 of 1877, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 18th July 1877, reversing a decree of Moulvi Muhammad Wajih-ul-la Khan, Subordinate Judge Moradabad, dated the 17th March 1877.

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being ancestral property, and the sale not having been made for purposes recognised by the Hindu law as necessary purposes. The purchaser set up as a defence to the suit that the plaintiff could not maintain the suit in his father's lifetime, and that the sale had been made for necessary purposes and was valid. The Subordinate Judge, on the 5th October 1874, for reasons which it is not material to state, dismissed the suit. The District Judge, on the 25th December 1875, on appeal by the plaintiff remanded the case to the Subordinate Judge for the trial of the issue, for what purpose was the property in suit alienated? The Subordinate Judge, on the 17th March 1877, found that the property in suit was alienated by Fateh Chand for the support of himself and the plaintiff, his minor son, and his wives and dependents. The District Judge, on the 18th July 1877, when the case came again before him, held that the sale was made without necessity, observing on the question of necessity as follows: "From the evidence on the record it is clearly established that applicant's father, who sold the property, was a man of immoral habits: that he was given up to wine and women, and he wanted money in consequence of those habits; it is even asserted pretty often that his illness arose from those habits; it is not alleged that he was in debt, and he certainly did not require the money (Rs. 260) some eighteen years ago for the necessary expenses of his son, then about three years old: the only possible ground that can be urged as an adequate one for the alienation is that the vendor was actually in want of means for his support and that of his family: this I consider not shown: how have they got on *these eighteen years since*; it has been repeatedly urged by respondent on the part of the heirs of the purchaser that the vendor then had no other property left when he sold this garden, but it does not therefore follow that there existed any real necessity for alienating *this* property: he has got on ever since without alienating property." The decree of the District Judge directed that the deed should be retained in the custody of the Court for three months, and that, if the plaintiff paid the purchase money into Court within that period, the deed of sale should be delivered to him, and possession of the property in suit be given to him.

The defendant appealed to the High Court.

The Division Court (SPANKIE, J., and OLDFIELD, J.) before which the appeal came for hearing referred to the Full Bench the questions set forth in the order of reference, which was as follows:

ORDER.—The suit has been brought by a son of a Hindu to obtain possession in his father's lifetime of joint ancestral property alienated by the father under a deed of sale, and to cancel the sale. This sale took place in 1859, since when the appellant, defendant, and they whom he represents have held possession, and it affected the entire family property and not merely a share of it. The Judge has decreed the claim for possession, subject to the refund of the purchase money to appellant, and reversed the decree of the Court of first instance, and has found on the evidence that the father of the plaintiff, Fateh Chand, who was made a defendant, but did not defend the suit, was a man of immoral habits, who sold the property to further his vicious pleasures, and not under any necessity recognised by Hindu law. There is no reason to believe that the purchaser acted otherwise than *bonâ fide*. We refer to the Full Bench of the Court the question whether the son can obtain possession of the family property, and whether the appellant by his purchase has acquired the share of the respondent's father, Fateh Chand, and may have that share ascertained by partition.

Pandit *Ajudhia Nath* and Babu *Oprokash Chunder Mukerji*, for the appellant.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondent.

The following judgments were delivered by the Full Bench:

PEARSON J.—An answer to the 'first question must apparently be given in the negative, regard being had to the Hindu law as expounded by our Courts.

On the hypothesis that the purchaser acted in good faith, I should, notwithstanding the lower appellate Court's unsatisfactory finding that the sale was made without any necessity, be inclined to answer the second question in the affirmative.

OLDFIELD, J.—The question of the power of a son to set aside a sale of joint ancestral property effected by the father, and the

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liability of the joint ancestral estate for a father's debts, was discussed by their Lordships of the Privy Council in *Girdharee Lall v. Kantoo Lall* and *Muddun Thakoor v. Kantoo Lall*, decided 12th May 1874(1), and the principle there laid down will be a guide in the decision of the case before us. In the first of those cases, a son sued as in the case before us, to cancel a sale made by his father of joint ancestral property, and to recover possession of the whole estate.

Their Lordships cited the authority of *Hanoomanpersaud Panday v. Babooee Munraj Koonweree* (2), to show the extent of the liability of the ancestral estate, quoted the remarks in that case of Lord Justice Knight Bruce, and observed: "That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him: it would be a pious duty on the part of the son to pay his father's debts and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce:—'The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt.'" And they go on to observe: "It is necessary therefore to see what was the nature of the debt for the payment of which it was necessary to raise money by sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it, and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt." And further on in their judgment a case decided by the same Court, *Junnuk Kishore Koonwar v. Rughoonundun Singh* (3) is cited, in which it was held "that it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to show that the debt was illegal or contracted for an immoral purpose;" in that case sales had been made simply in order to raise money for some

(1) 14 B. L. R., 187.

(2) 6 Moore's Ind. App., 393.

(3) S. D. A., L. P., 1861, p. 213.

purpose or another. Their Lordships refused to set aside the sale in the case of *Girdharee Lall v. Kantoo Lall* (1), finding that the sale had been made *bond fide*, and for value, in order to save ancestral property from sale in execution of a decree obtained on a bond, which it was not shown had been given for an immoral purpose.

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In the case now before us, however, the facts, as found by the lower appellate Court—and we must accept them—are widely different, and if we apply to them the principle which has been laid down, a case seems to have been made out for cancelment of the sale. It has been found that the sale was not made for the purpose of satisfying any debts due, nor for the use of the family, or from proper necessity, the family being in fairly easy circumstances, but entirely to provide money for the indulgence by the father of immoral and vicious pleasures. A sale under such circumstances would be liable to be set aside at the instance of the son. Nor can we say this is a case in which the purchaser, as dealing with the guardian of a minor, or the Manager of joint ancestral property, can claim partition, for though the transaction was so far *bond fide* on his part that he paid value for the property, it is clear that, if he had made reasonable enquiry, he could have learnt the circumstances under which the sale was being made, and been placed on his guard.

It remains to be seen whether the sale is valid to the extent of the father's interest in the property. Referring to West and Bühler, page 289, we find that it is stated that a single member cannot, according to the Shastras and to Colebrooke, deal directly with any portion of the common property, but that, acting on the dictum of Colebrooke, that, in case of an alienation for valuable consideration, equity would perhaps award partition to the alienee, the Court has allowed execution against the common property to ascertain the individual share, and make it available to the creditor, and has recognised that a single co-parcener may sell or incumber his own share for valuable consideration, the vendor acquiring a right to partition; and the Madras and Bombay High Courts have acted on

(1) 14 B. L. R., 187.

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this principle in the case of both voluntary and involuntary sales (1). But the principle cannot be said to have been hitherto recognised on this side of India. In a recent decision, however, of the Privy Council *Deendyal Lal v. Jugdeep Narain Singh*, dated 25th July 1877 (2), the question has been discussed. In that case a father had executed a bond in favour of defendant who had obtained a decree on it, and taken execution by sale of the father's interest in ancestral property which he himself bought. The son brought the suit to recover the property. A question arose whether under the law of Mitakshara the share of one co-sharer in a joint family estate could be taken and sold in execution of a decree against him alone. After commenting on the cases decided by the Madras and Bombay Courts, and remarking that they affirm not merely the right of a judgment-creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his co-parceners, and admitting that the latter proposition is opposed to several decisions of the Courts of Bengal, the Privy Council decided that the law, as respects the rights of an execution-creditor and of a purchaser at an execution sale, should be declared to be the same in Bengal as that which exists in Madras; and in the case before them they varied the decree which had been given for possession of the property to be held for the benefit of the joint family, by adding a declaration that the purchaser at the execution-sale has acquired the share and interests of the father in that property, and is entitled to take such proceedings as shall be advised to have the share and interest ascertained by partition. No decision was made in that case whether the same principle should apply to the case of a purchaser in a voluntary sale, which is the case before us; but their Lordships went on to observe that, "however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution-sale may be, it is clear that a distinction may, and in some cases does, exist between them." The objection that the sale is invalid even to the extent of a co-parcener's share is based mainly on the texts of Mitakshara, ch. i, s. i, vv. 27 to 30, and the

(1) See *Palaniivelappa Kaundan v. Mannaru Naikan*, 3 Mad. H. C. R., 416; *Varudev Bhat v. Venkatesh Sambhar*, 10 Bom. H. C. R., 139,

*Udaram Sitaram v. Ranu Panduji*, 11 Bom. H. C. R., 76; and *Mahabailaya v. Timaya*, 12 Bom. H. C. R., 138.  
(2) I. L. R., 3 Calc., 198.

constitution of the joint Hindu family as defined in *Appovier v. Rama Subba Aiyar* (1). The opposite view is supported by dicta of Colebrooke, Ellis and Strange, and is that followed in the Madras and Bombay Presidencies, and the question was fully discussed in *Vasudev Bhat v. Venkatesh Sanbhav* (2). But the question cannot be said to be at this time an open one on this side of India. There is no doubt a current of decisions by this Court, invalidating sales by one co-parcener without the consent express or implied of his co-parcener, and I have not been able to find any case where a voluntary sale was held valid to the extent of the seller's own interest,—*Ajoodhya Pershad v. Latta Pershad* (3); *Baboo Ram v. Gajadhur Singh* (4); *Byjnath Singh v. Rameshwar Dyal* (5); *Jeynarain Singh v. Roshun Singh* (6). The question has been decided in the same way by the Calcutta High Court in *Sadabart Prasad Sahu v. Foolbush Koer* (7). The law may be said to have been settled by a course of decisions, and it would be undesirable to disturb it.

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On this view the sale must be set aside, and the plaintiff is entitled to have possession of the property to be held as joint family property.

SPANKIE, J.—I accept the opinion of Mr. Justice Oldfield on the point referred to the Full Bench.

## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

SHEO PRASAD (JUDGMENT-DEBTOR) v. ANRUDH SINGH (DECREE-HOLDER).\*

1879  
April 17.

*Execution of Decree—Act IX of 1871 (Limitation Act), sch. ii, art. 167, cl. 2.*

The words "where there has been an appeal" in cl. 2, art. 167 of sch. ii of Act IX of 1871, contemplate and mean an appeal from the decree, and do not include an appeal from an order dismissing an application to set aside a decree under s. 119 of Act VIII of 1859.

(1) 11 Moore's Ind. App., 75.

(2) 10 Bom. H. C. R., 139.

(3) S. D. A., N.-W. P., 1864, vol. ii, p. 315.

(4) N.-W. P., H. C. Rep., F. B. R., 1866-67, p. 86.

(5) S. D. A., N.-W. P., 1864, vol. i, p. 292.

(6) S. D. A., N.-W. P., 1860, p. 162.

(7) 3 B. L. R., F. B., 31.

\* Second Appeal, No. 104 of 1878, from an order of C. W. Watts, Esq., Judge of Farukhabad, dated the 29th June 1878, affirming an order of Maulvi Abdul Basit, Munsif of Chibramu, dated the 10th May 1878.

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THE decree in this case was a decree for money and was made *ex parte* against the defendant on the 2nd December 1874. The defendant applied to the Court which made the decree, under the provisions of s. 119 of Act VIII of 1859, for an order to set it aside. The Court rejected this application, and the defendant appealed against the order of rejection. The Appellate Court, on the 17th April 1875, affirmed the order of rejection, and dismissed the appeal. On the 12th April 1878 the plaintiff, the decree-holder, applied for the execution of the decree. The defendant, the judgment-debtor, set up as a defence to this application that the execution of the decree was barred by limitation. The Court of first instance held, with reference to the provisions of cl. 2, art. 167, sch. ii of Act IX of 1871, that the period of three years allowed for the execution of the decree began to run from the date of the order of the Appellate Court dated the 17th April 1875, and the application for execution was consequently preferred within time. On appeal by the judgment-debtor the lower appellate Court concurred in the view taken by the Court of first instance of the question of limitation.

The judgment-debtor appealed to the High Court, contending that there had been no appeal within the meaning of cl. 2, art. 167, sch. ii of Act IX of 1871.

Munshi *Hanuman Parshad*, for the appellant.

Pandit *Ajudhia Nath* and Lala *Lalla Prasad*, for the respondent.

The judgment of the High Court was delivered by

PEARSON, J.—In our opinion the lower Courts are wrong in holding that the period of three years allowed by law for the execution of the *ex parte* decree, dated 2nd December 1874, should be reckoned from the date of the order of the Appellate Court which upheld the first Court's order refusing the application made by the defendant for the re-hearing of the suit. The first two clauses of art. 167, sch. ii, Act IX of 1871, allow three years for the execution of a decree from the date of the decree, or (where there has been an appeal) from the date of the final decree of the Appellate Court. We think it beyond doubt that the words, "where there

has been an appeal," contemplate and mean an appeal from the decree; and no other appeal. In the present case there was no appeal from the decree now sought to be executed; nor indeed under the provisions of the old Code of Procedure was that decree appealable. The application for execution of the decree of 2nd December 1874, presented on 12th April 1878, was clearly beyond time, and should have been disallowed. We reverse the orders of the lower Courts and decree the appeal, with costs in all Courts.

*Appeal allowed.*

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

RAM KISHEN (DECREE-HOLDER) v. SEDHU (JUDGMENT-DEBTOR).\*

*Execution of Decree—Act X of 1877 (Civil Procedure Code), s. 230.*

*Held* that the words "the last preceding application" in the third clause of s. 230 of Act X of 1877 mean an application under that section, and not an application under Act VIII of 1859.

THE decree-holder in this case applied in February 1878, under s. 230 of Act X of 1877, for the execution of the decree. He had previously applied under Act VIII of 1859 for the execution of the decree in July 1877. The Court executing the decree refused to grant the application for reasons which it is not necessary for the purposes of this report to state. On appeal by the decree-holder the lower appellate Court refused to grant the application, with reference to the third clause of s. 230 of Act X of 1877, on the ground that the decree-holder had not on the application made in July 1877, used due diligence to obtain complete satisfaction of the decree.

The decree-holder appealed to the High Court, contending that the words "the last preceding application" in the third clause of s. 230 of Act X of 1877 meant the last preceding application under that section, and not a preceding application under Act VIII of 1859.

Munshi Hanuman Prasad, for the appellant.

\* Second Appeal, No. 93 of 1878, from an order of H. G. Keene, Esq., Judge of Agra, dated the 31st July 1878, affirming an order of Maulvi Mubarak-ul-lah, Munsif of Muthra, dated the 15th June 1878.

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SINGH.

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April 21.

1879      *The Junior Government Pleader (Babu Dwarka Nath Banerji),*  
RAM KISHEN for the respondent.  
 v.  
 SEDHU.      The judgment of the Court was delivered by

OLDFIELD, J.—The Judge has disallowed the application for execution on the ground, though not taken by the judgment-debtor, that the execution of the decree is barred under the provisions of s. 230, Act X of 1877, as due diligence was not used to procure complete satisfaction of the decree on the last preceding application. But the last preceding application to which s. 230 refers is an application made under that section, and in the case before us the last preceding application was made in July 1877 before Act X of 1877 came into force. Those proceedings in execution were ultimately disposed of in December 1877, but there was no fresh application for execution of the decree made intermediately between July and December 1877. We reverse the order of the Judge and decree the appeal, and allow execution of the decree to proceed. The appellant will have costs in all Courts.

*Appeal allowed.*

## CRIMINAL JURISDICTION.

1879  
April 21.

*Before Mr. Justice Spinkie.*

EMPRESS OF INDIA v. NILAMBAR BABU.

*Act X of 1872 (Criminal Procedure Code), ss. 4, 297, 415, 416, 417, 418, 419, 420—Stolen Property—High Court, Powers of Revision—"Judicial Proceeding."*

Where a person was accused of dishonestly receiving stolen property knowing it to be stolen, and was discharged by the Magistrate on the ground that there was no evidence that the property was stolen, *held* that the Magistrate was competent, believing that the property was stolen, to make an order under s. 418 of Act X of 1872 regarding its disposal (1).

Where there is a Court of Appeal, resort should be had thereto before application is made to the High Court for the exercise of its powers of revision.

*Quare.*—Whether the issue by the Magistrate of a proclamation under s. 416 of Act X of 1872 is a "judicial proceeding," within the meaning of s. 297 of that Act.

(1) If the Court is of opinion that no offence appears to have been committed regarding the property, it is bound to restore the property to the accused person.—*In re Annapurnabai*, I. L. R., 1 Bom., 630.

THIS was an application to the High Court for the exercise of its powers of revision under Act X of 1872. The petitioner and one Khazan Singh were accused, under s. 411 of the Indian Penal Code, of dishonestly receiving stolen commissariat tea, knowing that the same was stolen property. There being no evidence that the tea was stolen commissariat property, the Magistrate, Mr. E. White, discharged the accused persons on the ground that no offence had been proved against them, and ordered that a proclamation under the provisions of s. 416 of Act X of 1872 should issue. The petitioner applied for the revision of the Magistrate's order.

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The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown, contended that a proceeding under s. 416 of Act X of 1872 was not a "judicial proceeding," and the High Court could not therefore interfere under s. 297.

Mr. Colvin.—The Magistrate must be taken to have acted under s. 418 of Act X of 1872 and not s. 416. He could not have acted under s. 416, as the procedure laid down in ss. 415 and 416 applies to property seized by the police under suspicious circumstances, and not to property regarding which an offence appears to have been committed. Orders made under s. 418 are open to revision,—s. 419. No offence having been proved against the petitioner, no offence appeared to have been committed, within the meaning of s. 418, and the Magistrate's order is illegal. The property was not stolen property.

The *Junior Government Pleader*.—The Magistrate considered that the property was stolen property, which was sufficient to enable him to make an order under s. 418. There are good reasons for thinking that the property was stolen.

SPANKIE, J.—A preliminary objection was taken by the Junior Government Pleader that this Court cannot interfere under s. 297 of the Criminal Procedure Code, as the order complained of purports to have been made under s. 416 of the Code, which directs the course to be pursued where the ownership of property seized by the police, as alleged or suspected to have been stolen, is unknown, and therefore the order was not made in the course of a "judicial proceeding." Ordinarily a proclamation issued under s. 416 would be made in consequence of a seizure by any police officer



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of property alleged (i) or suspected (ii) to have been stolen, or found (iii) under circumstances which create suspicion of the commission of any offence. On receiving the police report the Magistrate is to make such order respecting the custody and production of such property as he thinks proper (s. 415). But when the owner of any such property is unknown the Magistrate may detain it, or the proceeds thereof, if sold, and in case of such detention shall issue a proclamation, the particulars of which are detailed in s. 416.

It may perhaps be doubted, if nothing more be done than the mere issue of a proclamation, whether the course adopted by the Magistrate would have amounted to a "judicial proceeding." At the same time "judicial proceeding" means any proceeding in the course of which evidence is, or *may be taken*, or in which any judgment, sentence, or final order is passed on recorded evidence. The action of the Magistrate in issuing the proclamation is to require any person who may have a claim to such property as may be sent in by the police under s. 415 to appear before him and establish his claim within six months. This is possibly a stage of a judicial proceeding, for at the expiration of the term provided by the proclamation, it is probable that a claimant might appear, and evidence would be recorded. But it is not necessary for me to determine the point in this case. For Nilambar Babu and Khazan Singh, the accused, were arrested and sent in to the Magistrate for trial under s. 411 of the Penal Code (the stolen property being alleged to belong to Government) after an investigation made by the police. This therefore was not a case in which, in dealing with the property seized by them, and finding that the owner was unknown the Magistrate had issued a proclamation under s. 416 of the Criminal Procedure Code.

The proceeding that followed was a judicial proceeding in which evidence was recorded, after which the Magistrate felt himself bound to discharge the accused, as there was nothing to establish the fact that any tea had ever been stolen or missed from the commissariat godowns, and no claim on account of the tea had been made by the Commissariat Department. On the contrary, the Commissariat officials, Lieutenant Spence, Sub-Assistant Commissary-General, Sergeant Griffiths, his subordinate, and Lieutenant Davies, Quartermaster, 22nd Regiment, Sergeant Harris, Quarter-

master Sergeant, all concurred in saying that not only no tea had been stolen, but that under the circumstances it was impossible that it should have been stolen. The Magistrate states that special inquiry had been made by the police in order to ascertain how Nilambar Babu, the victualling *gomashtha*, could have become possessed of the tea, which was proved to be ration tea, but nothing further had been elicited, the police reporting that the Commissariat officials would not disclose the real facts of the case.

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"It must, however," remarks the Magistrate, "be admitted that the case against the two accused is of the very gravest suspicion: a sack of tea precisely resembling ration tea is carried off in a closed *ekka* (i.e., with the curtains down) from the neighbourhood of the Commissariat godown, and no explanation appears as to whence this tea came: further, five similar sacks of tea are found in the possession of the victualling *gomashtha*, regarding which he can give no explanation whatever, and which (tea) precisely resembled ration tea, which it is his duty to serve out for the troops. Under the circumstances there may possibly be some justification for the assertion of the police that the Commissariat officials, had they chosen to exert themselves, might have discovered how the *gomashtha* could have abstracted the Government tea: perhaps even now a thorough investigation into the Commissariat management here by the Heads of the Department might disclose the manner in which the speculation could have been carried on."

The Magistrate then discharged the accused, subject to their apprehension hereafter on the discovery of fresh evidence, and on the same day by a separate proceeding, or what is called "a footnote in the case of Nilambar Babu," ordered that a copy of his judgment should be sent to the Commissary-General for information, together with a complete list of the military stores found in possession of the *gomashtha*, and further that "a proclamation under s. 416, Criminal Procedure Code, will issue regarding these articles." Nilambar Babu applies for a revision of this order under ss. 294, 297 and 419, Criminal Procedure Code, on the ground (i) that there was no evidence on record to show that the property was stolen property; (ii) that there was none that would justify action under s. 416 of the Code of Criminal Procedure; (iii) that the remarks made regarding the petitioner are not borne out

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by the evidence on record, and should be set aside ; and (iv) that the property may be released in favour of the petitioner.

Under s. 418 the Magistrate was at liberty, at the close of the inquiry into the police charge under s. 411, Penal Code, to make such order as appeared right for the disposal of the property produced before him, and regarding which any offence appeared to have been committed. It is contended that the Magistrate's finding shows that no offence appears to have been committed. But I do not understand the Magistrate to mean that no offence had been committed. I understand that he reluctantly felt himself compelled to discharge the accused for want of further evidence. The petitioner was aware, it would seem, that the Magistrate's order was made really under s. 418, for he cites s. 419 of the Criminal Procedure Code as one under which this Court could deal with it, and this is so. But there was a Court of Appeal to which he should have first resorted, *vis.*, that of the Sessions Judge, who might have interfered in the matter (1). Resort to this Court as one of Revision was premature, and it has been the practice, I think, of this Court not to interfere in revision, when the petitioner has neglected to avail himself of the ordinary channel of relief below. But as this application has already been admitted by a Judge of this Court, and as the section (419) admits of my interference, it would be better perhaps and more convenient for all to dispose of the case here. My reasons for assuming that the order of the Magistrate was passed under s. 418 is that it was made at the conclusion of the inquiry in his Court into the alleged offence under s. 411 of the Penal Code, and a proclamation under s. 416 was issued, because s. 420 provides that an order passed under ss. 418 and 419 may be in the form of a reference of the property to the Magistrate of the District or to a Magistrate of a Division of a District, who shall in such cases deal with it as "*if the property had been seized by the Police and the seizure had been reported to him in the manner hereinbefore mentioned.*" It was not necessary in this case that Mr. White, the Magistrate, should make the order in the form referred to, as he was already competent to issue the proclamation referred to in s. 416. So far then it appears that

(1) The words "Court of Appeal" at the moment pending—*Empress v. Joggessur Mochi*, I. L. R., 3 Cal., 379.  
in s. 419 are not necessarily limited to a Court before which an appeal is

the order was one within the competence of the Magistrate to make, and that the Magistrate believed that an offence had been committed, though it was not on the evidence before him established against the accused. Whether action under s. 416 was justified by the evidence was for the Magistrate to determine. I cannot say that he exercised his discretion wrongly regarding the tea regarding which the Babu made no claim. On the contrary, the latter said that the tea was found in the house occupied by Khazan Singh, his servant, and he supposes that Khazan Singh put it there. Moreover he did not explain how he became possessed of the tea or sugar either, but he said that they were not ration food. He, however, explained his possession of other portions of the property found. There was moreover some evidence that the guns were his as also the "kuk-ri" and pistol, and the cartridges did not appear to bear the Queen's mark. The other articles, too, were such as he could have bought at public auction or might reasonably have in his own possession. This, too, may be said of the sugar which deed not exceed  $1\frac{1}{2}$  seers in quantity. The law requires that "an offence should appear to have been committed," and when this is the case, an order may be made under s. 418 of the Criminal Procedure Code. But with respect to the property proclaimed an offence appears to have been committed only as regards the tea. Therefore the proclamation must be confined to the tea found and seized by the police, and in this respect the order must be modified, and the remaining portion of the property will be excluded from the proclamation. I see no remarks on the part of the Magistrate regarding the Babu which are not warranted by the suspicious character and the circumstances of the case, and the Court below was quite justified in refusing to give back the tea, but the petitioner may have the rest of the property restored to him.

1879  
 EMPRESS OF  
 INDIA  
 v.  
 NILAMBAR  
 BABU.

## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

SOHAN LAL AND ANOTHER (DECREE-HOLDERS) v. KARIM BAKHSH  
 (JUDGMENT-DEBTOR).\*

1879  
 April 22.

*Execution of Decree—Act X of 1877 (Civil Procedure Code), s. 230—  
 Limitation.*

The concluding clause of s. 230 of Act X of 1877 refers to the question of limitation, not that of due diligence.

\* Second Appeal, No. 114 of 1878, from an order of W. C. Turner, Esq., Judge of Saharanpur, dated the 24th July 1878, affirming an order of Babu Ishri Prasad, Munsif of Deoband, dated the 6th March 1878.

1879

SOHAN LAL  
v.  
KARIM  
BAKSH.

Where, therefore, the decree-holder had not on the last preceding application under s. 230 of Act X of 1877 used due diligence to procure complete satisfaction of the decree, and Act X of 1877 had not been in force three years, *held* that the provisions of the third clause of s. 230 of Act X of 1877 were applicable to a subsequent application under that section.

The transferees of the decree in this case applied on the 23rd February 1878, under s. 230 of Act X of 1877, for the execution of the decree, which was dated the 30th March 1872. They had previously applied under that section for the execution of the decree on the 21st December 1877. The Court executing the decree ordered on this application that the notices required by ss. 232 and 248 of Act X of 1877 should be given. The notices required by s. 232 were served, but the notice required by s. 248 was not served as the decree-holder failed to pay the Court fees leviable for the service of the notice. In consequence of this failure the application was dismissed by the Court. The judgment-debtor set up as a defence to the application dated the 23rd February 1878, that under s. 230 of Act X of 1877 it ought not to be granted, the decree-holder not having on the preceding application, dated the 21st December 1877, used due diligence to procure satisfaction of the decree. The Court refused to grant the application on the ground that the decree-holder had not on the preceding application used due diligence to procure satisfaction of the decree. On appeal by the decree-holders the lower appellate Court affirmed the order refusing the application.

The decree-holders appealed to the High Court, contending, with reference to the concluding clause of s. 230 of Act X of 1877, that the provisions of the third clause of that section were not applicable, three years after the passing of Act X of 1877 not having elapsed.

Munshi *Sukh Ram*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

The judgment of the Court was delivered by

PEARSON, J.—The concluding clause of s. 230 of Act X of 1877 appears to us to refer to the question of limitation, not that of diligence. In this case a previous application had been made to the Court under the section, of which the third clause therefore appears to be applicable. The appeal is dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

1879  
April 23.

**KADIR BAKHSH (DECREE-HOLDER) v. ILAHI BAKHSH AND ANOTHER**  
(JUDGMENT-DEBTORS).\*

*Execution of Decree—Powers of the Court in executing transmitted decree—  
Act X of 1877 (Civil Procedure Code), ss. 228, 232—Transfer of Decree.*

Where a decree was sent to a Court for execution, and was subsequently transferred by assignment, and the transferee applied for the execution of the decree to the Court to which the decree was sent for execution, *held* that such application should be made not to such Court but to the Court which passed the decree.

THE decree in this case had been sent by the District Court at Cawnpore to the District Court at Aligarh for execution, and the District Court at Aligarh had directed the Subordinate Judge of Aligarh to execute the decree. On the 7th June 1878 the decree having been transferred by assignment, and the transferee having applied to the Subordinate Judge of Aligarh for its execution, the judgment-debtors objected to the application being made to the Subordinate Judge of Aligarh, contending that it should be made to and be disposed of by the Court which passed the decree. The Subordinate Judge of Aligarh overruled this objection. On appeal by the judgment-debtors the lower appellate Court allowed the objection.

The decree-holder appealed to the High Court, contending that the Subordinate Judge had the same powers under s. 232 of Act X of 1877 as the Court which passed the decree.

Mr. Conlan and Pandit *Ajudhia Nath*, for the appellant.

The respondents did not appear.

The judgment of the Court was delivered by

PEARSON, J.—We see no sufficient reason to interfere with the lower appellate Court's decision which is in conformity with the terms of the law, and is supported by this Court's ruling dated the 20th December 1870 (1). The appeal is therefore dismissed.

*Appeal dismissed.*

(1) Unreported.

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\* Second Appeal, No. 131 of 1878, from an order of G. E. Watson, Esq., Judge of Aligarh, dated the 9th November 1878, reversing an order of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 3rd July 1878.

1879  
April 23.

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

**COLLINS (DECREE-HOLDER) v. MAULA BAKHSH AND OTHERS (JUDGMENT-DEBTORS).\***

*Execution of Decree—Limitation.*

*Held* that an application to the Court which passed a decree, that it may be sent for execution to another Court, is an application to keep such decree in force within the meaning of the Limitation Act.

THE decree in this case was passed by the Munsif of Meerut on the 23rd December 1873, and was affirmed by the Appellate Court on the 13th June 1874. On the 22nd April 1875 the decree-holder applied to the Munsif of Meerut under s. 285, Act VIII of 1859, for the execution of the decree by the Munsif of Bulandshahr. The Munsif of Meerut granted the certificate required by that section, and, as it appeared, made it over to the decree-holder. On the 22nd July 1877 the decree-holder presented the certificate to the Munsif of Bulandshahr with a view to the execution of the decree. The Munsif refused to receive the certificate, and directed the decree-holder to apply for a fresh certificate. The decree-holder applied to the Munsif of Meerut for a fresh certificate and obtained it, and on the 29th January 1878 applied to the Munsif of Bulandshahr for the execution of the decree. The Munsif held that the execution of the decree was barred by limitation, and dismissed the application. On appeal the lower appellate Court affirmed the order of the Munsif, holding that an application to transfer a decree for execution from one Court to another is not an application to keep a decree in force.

The decree-holder appealed to the High Court.

Munshi *Hanuman Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Pandit *Nand Lal*, for the respondents.

The judgment of the High Court was delivered by

PEARSON, J.—The appeal must prevail. The decision of the lower Courts is opposed to numerous rulings of this Court (1) to the effect that an application to transfer a decree for execution

\* Second Appeal, No. 123 of 1878, from an order of R. M., King, Esq., Officiating Judge of Meerut, dated the 24th September 1878, affirming an order of Muhammad Mir Badsba, Munsif of Bulandshahr, dated the 13th April 1878.

(1) See *Husain Bakhsh v. Madge*, I. L. R., 1 All., 525.

from one Court to another is an application to keep a decree in force. We accordingly decree the appeal with costs, and reversing the orders of the lower Courts, direct the Court of first instance to proceed with the application according to law.

1879

COLLINS  
v.  
MAULA  
BAKSH.

*Appeal allowed.*

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

RAGHU RAM AND OTHERS (JUDGMENT-DEBTORS) v. DANNU LAL  
(DECREE-HOLDER).\*

1879

*April 25.*

*Execution of Decree—Proceeding to enforce decree—Act XIV of 1859  
(Limitation Act), s. 20—Limitation.*

Application for the execution of a decree was made on the 21st December 1864, and in pursuance of such application the notice required by law was issued to the judgment-debtor. On the 7th February 1865 the Court executing the decree called on the decree-holder to produce proof of the service of such notice within four days. On the 23rd February 1865, in consequence of the decree-holder having failed to produce such proof, the Court dismissed the application. There was no proceeding either of the decree-holder or of the Court between the 7th and the 23rd February 1865. On the 18th February 1868 application was again made for the execution of the decree. *Held* that the proceeding of the Court of the 23rd February 1865, striking off the former application for default of prosecution was not a proceeding to keep the decree alive, and the latter application was therefore beyond time.

THIS was an application for the execution of a decree. The facts of the case are sufficiently stated in the judgment of the High Court, to which the judgment-debtors appealed from the order of the lower appellate Court granting the application. The judgment-debtors contended that the application was barred by limitation.

*Lala Lalla Prasad*, for the appellants.

*Munshi Hanuman Prasad*, for the respondent.

The judgment of the Court was delivered by

PEARSON, J.—The question is whether the application of the 18th February 1868 was within time. The last preceding

\* Second Appeal, No. 67 of 1878, from an order of H. A. Harrison, Esq., Judge of Mirzapur, dated the 29th April 1878, reversing an order of Mirza Abid Ali Beg, Subordinate Judge of Mirzapur, dated the 1st March 1876.



1879 application was made on the 21st December 1864, and in pursu-  
 RAGHU RAM ance thereof notice was issued to the judgment-debtor. On the  
 v. 7th February 1865 the Court required the decree-holder to produce  
 DANNU LAL. proof of the service of the notice within four days, and on the 23rd  
 idem, in consequence of his having failed to comply with the re-  
 quisition, struck off the application.

The first Court has held the application of the 18th February 1868 to have been beyond time, being of opinion that the period of three years allowed by law should be reckoned from the 7th February 1865, the date on which the decree-holder ceased to proceed in the matter of the application of the 21st December 1864. The lower appellate Court has held that the period of limitation should be reckoned from the 23rd February 1865, the date on which the application of 21st December 1864 was struck off, and consequently that the application of 18th February 1868 was within time. The first plea in appeal impugns the lower appellate Court's ruling on the point in question, and is accepted by us as valid.

There was no proceeding either of the decree-holder or of the Court between the 7th and 23rd February 1865. On the part of the decree-holder, instead of action, there was inaction; and the Court's proceeding of the latter date striking off the application for default of prosecution was certainly not a proceeding to keep the decree alive. The view we take appears to us to be strongly supported by some of the observations in the Privy Council's judgment dated 14th July 1870, in the case of *Dhiraj Mahtab Chund Bahadur v. Bulram Singh Baboo* (1) as well as by the judgment (2) to which the lower appellate Court refers in support of its own view.

We accordingly decree the appeal with costs, reversing the lower appellate Court's order and restoring that of the Court of first instance.

*Appeal allowed.*

(1) 5 B. L. R., at p. 616.

(2) *Roy Dhunput Singh Roy v. Mudhomottee Debia*, 11 B. L. R., 23.

## APPELLATE CIVIL.

1879  
March 28.*Before Mr. Justice Pearson and Mr. Justice Oldfield.***MADHO DAS AND OTHERS (PLAINTIFFS) v. RUKMAN SEVAK SINGH  
AND OTHERS (DEFENDANTS).\****Act VIII of 1859 (Civil Procedure Code), s. 377—Review of Judgment—  
Limitation.*

The plaintiff in a suit applied, more than two years after the proper time, for a review of the judgment in such suit, filing with his application a copy of a decision by the High Court, which had been passed subsequently to the date of such judgment, in support of a contention contained in his application which should have been, but was not, urged at the hearing of his suit. Such contention and the other arguments and statements contained in his application might have been adduced within the time allowed by law for an application for a review of judgment. *Held* that, as such contention might have been urged at the first hearing of the case, there was no "just and reasonable cause" for preferring the application after time, and the Court of first instance was therefore not warranted in granting the application and reviewing its judgment.

THE facts of this case were as follows: On the 9th May 1868 one Rajnit Kuar, as the guardian of her minor son, Rukman Sevak Singh, borrowed jointly with one Ajudhia Prasad Singh certain moneys from one Harakh Chand, and gave him a bond for the payment of such moneys, which charged amongst other properties certain immoveable property belonging to Rukman Sevak Singh with the payment of such moneys. This bond was executed by Ajudhia Prasad Singh for himself and as attorney of Rajnit Kuar. In March 1873 Harakh Chand sued to enforce payment of this bond. The Subordinate Judge, on the 23rd August 1873, gave the plaintiff a decree against Ajudhia Prasad Singh, who confessed judgment, but refused to pass a decree against the minor or his property, on the ground that his mother had no power to borrow money on his behalf or to alienate his property without the permission of the District Court, which had granted her a certificate of administration under Act XL of 1858 in respect of her minor son's property. On the 3rd November 1875 Harakh Chand applied for a review of this judgment, stating that he did so, "with reference to evidence which could not be adduced either when the case was decided or within the period allowed by law." The application pointed out that Rajnit Kuar had not, as the Subordinate Judge considered, been

\* Regular Appeal, No. 23 of 1877, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Benares, dated the 24th November 1876.

1879  
**MADHO DAS**  
 v.  
**RUKMAN**  
**SEVAK**  
**SINGH.**

granted a certificate of administration under Act XL of 1858 in respect of her minor son's property, but a certificate under Act XXVII of 1860 to collect the debts of her deceased husband, and that the High Court on the 13th August 1875 had decided, in a suit by one Kishna Ram against the defendants in the present suit, that Rajnit Kuar did not stand in need of obtaining permission from the District Court to borrow money on behalf of her minor son or to alienate his property, as she had not been empowered by the District Court under Act XL of 1858 to administer his estate. A copy of this decision by the High Court was the new evidence on which the plaintiff relied. The Subordinate Judge admitted the application, and, notwithstanding that the minor was not then properly represented in the suit, reheard it, and on the 29th November 1876, in review of his first judgment, gave the plaintiff's representatives, the plaintiff having meanwhile died, a decree against the minor's property, observing that the minor might sue to have the acts of his mother set aside when he became of age, if he had been injured by them.

The plaintiff's representatives appealed against this decree to the High Court, contending that the minor should have been properly represented in the suit, and the Subordinate Judge then should have determined whether the charge which they sought to enforce on his property was valid or not.

Munshi *Hanuman Prasad*, for the appellants.

Mr. *Ross* and Munshi *Kashi Prasad* for the respondents.

The judgment of the Court was delivered by

PEARSON, J.—This appeal has been pending here for more than two years because one of the defendants, respondents, viz., *Rukman Sevak Singh*, who is a minor, was not properly represented. He is now at last represented by *Dip Narain Singh*, who has been duly appointed his guardian, and the appeal is ready for hearing. The appeal relates to a judgment passed by the lower Court on the 29th November 1876, in review of a former judgment dated 23rd August 1873. The decree is in favour of the plaintiffs, appellants; but one of the grounds of the appeal is that the minor aforesaid was not duly represented in that Court. An objection has been taken by the counsel for the guardian of the minor on his behalf that

the review was improperly granted more than two years after the date of the judgment originally passed in the suit, without any sufficient explanation of the long delay in making the application for review. We have considered the objection, and are of opinion that it is valid and must be allowed.

1876

MADHO DAS

v.

RUKMAN  
SEVAK  
SINGH.

The application for review of the judgment passed on the 23rd August 1873 bears the date of the 3rd November 1875, and the explanation which it offers of the delay of more than two years in preferring it is that fresh evidence has come to hand, which could not be adduced either when the case was decided or within the period allowed by law. The evidence so tendered was a copy of a judgment of this Court dated 13th August 1875, in regular appeal No. 151 of 1874, Ato Kuar and Ranjit Kuar herself and as guardian of Rukman Sevak Singh, minor, defendants, appellants, v. Kishna Ram, plaintiff, respondent. In that case, in reference to a transaction then in question between the parties aforesaid, the Court remarked that the minor's mother was competent to act in the transaction as his guardian, and, as she had not been empowered to administer his estate by the Civil Court, was not bound to obtain its sanction to her proceedings. The object of filing the judgment containing the remark aforesaid was to support the contention that the minor was bound by the mortgage-deed executed by his mother as his guardian in the present case. The judgment so filed was not properly speaking evidence at all. It was merely authority in support of a contention which should have been urged upon the Subordinate Judge when hearing the case in the first instance.

We do not say that the grounds set out in the application for review were not good grounds for granting a review, nor can they be called in question. But, however good they were, the application could not be granted unless just and reasonable cause were shown to the satisfaction of the Court for not having preferred it within the time allowed by the law. In this case no such just and reasonable cause was shown. The reference to this Court's judgment dated 13th August 1875 was a mere blind. The argument to which that judgment gave countenance and the other arguments and statements contained in the application might have been adduced within the proper time.

1879  
**MADHO DAS** application and reviewing its former judgment of 23rd August  
 v. 1873. We accordingly allow the objection taken here on behalf  
**RUKMAN** of the minor respondent, and dismiss the appeal with costs, and set  
**SEVAK** aside the judgment and decree dated the 29th November 1876.  
**SINGH.**

### CIVIL JURISDICTION.

1879  
 April 17.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

**SULTAN KUAR (JUDGMENT-DEBTOR) v. GULZARI LAL (DECREE-HOLDER).\***

*Execution of Decree—Sale of a Money-decree—Act X of 1877 (Civil Procedure Code), ss. 166, 273.*

*Held* that Act X of 1877 does not contemplate the sale of a decree for money as the result of its attachment in the execution of a decree, and the attachment of a decree for money in the mode ordained in s. 273 cannot lead to its sale.

*Held* also that the last clause but one of s. 273 applies to other than money-decree.

Where two decrees for money, although they were not passed by the same Court, were being executed by the same Court, *held* that the provisions of the first clause of s. 273 of Act X of 1877 were applicable on principle.

THIS was a reference to the High Court, under s. 617 of Act X of 1877, by Mr. R. F. Saunders, District Judge of Farukhabad. One Sultan Kuar, on the 8th August 1878, obtained a decree against one Lahro Bai and certain other persons for Rs. 500, in the execution of which she caused certain immoveable property to be attached as the property of the judgment-debtors. One Gulzari Lal objected to the attachment of this property, claiming it as his own, and on the 14th September 1878 the Court to which the decree had been sent for execution ordered that the attachment should be removed, and that Sultan Kuar should pay the costs of the objection, which amounted to Rs. 25 or thereabouts. Gulzari Lal, in order to enforce payment of this amount, caused Sultan Kuar's decree to be attached in the execution of the order dated the 14th September 1878. Sultan Kuar objected to the sale of her decree on the ground that Act X of 1877 did not contemplate the sale of a decree for money. The Court of first instance disallowed the objection and directed that the decree should be sold. Sultan Kuar

\* Reference, No. 1 of 1879, by R. F. Saunders, Esq., Judge of Farukhabad.

appealed to the District Judge against the order disallowing her objection, who referred to the High Court the question whether or not Sultan Kuar's decree was saleable in the execution of the order dated the 14th September 1878.

The parties were not represented.

The judgment of the Court was delivered by

PEARSON, J.—Although debts are mentioned in the category of property liable to attachment and sale in execution of a decree in s. 166 of Act X of 1877, yet it is apparent from the provisions of s. 273 of the Act that the sale of a money-decree is not contemplated as the result of its attachment, and that an attachment in the mode therein ordained cannot lead to a sale.

In our opinion the Judge is wrong in holding the last clause but one of s. 273 to be applicable in the present case. That clause applies to other than money-decrees. Although the two decrees held by Gulzari Lal and Sultan Kuar respectively were not passed by the same Court, nevertheless as they are being executed by the same Court, the provisions of the first clause of the section are applicable on principle.

Our opinion may be communicated to the Judge in reply to his reference.

## APPELLATE CIVIL

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

KANCHAN SINGH AND OTHERS (JUDGMENT-DEBTORS) v. SHEO PRASAD (DECREE-HOLDER).\*

1879  
April 28.

*Execution of Decree—Decree for money payable by Instalments—Adjustment of Decree—Act VIII of 1859 (Civil Procedure Code), s. 206—Act IX of 1871 (Limitation Act), sch. ii, art. 167.*

A decree for the payment of money by instalments directed that, if the judgment-debtor failed to pay two instalments in succession, the decree-holder should be entitled to enforce payment of the whole amount due under the decree. The decree-holder, alleging that a portion of the ninth instalment was payable and that the whole of the tenth (the last) instalment was due, applied to enforce payment of the moneys due under the decree.

\* Second Appeal, No. 111 of 1878, from an order of G. L. Lang, Esq., Officiating Judge of Aligarh, dated the 28th May 1878, reversing an order of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 14th December 1877.

1879

KANCHAN  
SINGH  
v.  
SHEO PRA-  
SAD.

*Held per* PRARSON, J., that whether former instalments had been paid or not was immaterial, and the application, being within three years from the dates on which the ninth and tenth instalments became due, was, with reference to art. 167, sch. ii of Act IX of 1871, within time (1).

SPANKIE, J., refused to interfere in second appeal inasmuch as the lower appellate Court had found as a fact that there had been no such default in the payment of the former instalments as was contemplated by the decree.

THE decree in this case was a decree for the payment of Rs. 2,750 by annual instalments and was dated the 6th April 1866. The annual instalments were fixed by the decree at Rs. 250, and extended to 1876, and were payable in the month of Bhadon, the first instalment being payable in Bhadon 1866. Under the terms of the decree all payments were to be endorsed on the decree, and, if the judgment-debtors failed to pay two instalments in succession, the decree-holder was empowered to enforce payment of the whole amount due under the decree. The decree-holder, alleging that he had received all but Rs. 100, being a portion of the instalment for 1875, and Rs. 250, the whole of the instalment for 1876, applied on the 17th July 1877, to recover Rs. 350 by the execution of the decree. It appeared that the payments which had been made under the decree had been endorsed on the copy of the decree in the decree-holder's possession. The judgment-debtors objected to the execution of the decree on the ground that the application for execution was barred by limitation, alleging that the payments which had been made had been made out of Court, and contending that, inasmuch as under s. 206 of Act VIII of 1859 payments of instalments out of Court could not be recognised, it must be taken that the judgment-debtors had failed to pay the first and second instalments, and the decree-holder should have applied for the execution of the decree within three years from the dates those instalments became due. The Court of first instance allowed this contention and held that the application was beyond time. On appeal by the decree-holder the lower appellate Court held that the payments of the instalments had been made in accordance with the terms of the decree, and such payments could be recognised, and that the application was within time.

(1) See, however, *Dulsook Rattan-chand v. Chugon Narrun*, I. L. R., 2 Bom., 356, where it was held, in the case of a decree payable by instalments, with a proviso that in default of payment of any one instalment the

whole amount of the decree should become payable at once, the decree is barred, if application for execution be not made within three years from the date on which any one instalment fell due and was not paid.

The judgment-debtors appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Jogindro Nath Chaudhri*,  
for the appellants.

Pandit *Ajudhia Nath*, for the respondent.

The following judgments were delivered by the Court :

PEARSON, J.—Art. 167, sch. ii of Act IX of 1871, provides that an application to enforce payment of an instalment which the decree directs to be paid on a specified date may be made within three years from the date so specified. The present application to enforce the payment of instalments which became due under the decree in Bhadon 1875 and Bhadon 1876 was preferred on the 17th July 1877 within the time allowed by the law. It is difficult therefore to understand how it can be contended that the application is barred by the Limitation Law. The ground of the contention is that there is no legal proof of any previous payments having been made under the decree which was passed in April 1866; and that, as the decree-holder was empowered by the terms of the decree to realise the whole amount at once in the event of two instalments not being duly paid, and failed to do so within three years from Bhadon 1868, he is now precluded from recovering the instalments of 1875 and 1876. This contention appears to me to be quite untenable. The decree-holder's omission in 1868, 1869, and 1870 to avail himself of his right to realise at once the entire amount of the judgment-debt may possibly preclude him from now enforcing that right; but he is not seeking to do so. By foregoing or forfeiting that right he has not lost his right to the instalments annually falling due. It seems to me to be immaterial whether former instalments have been paid or not; but I observe that it was not seriously pleaded in the lower Courts that they had not been paid. What the judgment-debtors pleaded was that payments out of Court do not save limitation; and the Court of first instance held that the payments having been made out of Court could not be recognised. The non-recognition of those payments does not, however, exclude the present application from the operation of the clause above-quoted of art. 167, sch. ii, Act IX of 1871. The pleas in appeal are worthless in my opinion and I would dismiss the appeal with costs.

1879

KANCHAN  
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1879  
 KANCHAN  
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 SAD.

SPANKIE, J.—On the facts found by the lower appellate Court that there had been no such default as that referred to in the decree in the payment of instalments, I do not think that I could interfere in second appeal, and this appears to be the more proper course, because the judgment-debtor does not really seem to have denied the payments out of Court allowed by the decree-holder to have been made to him in accordance with the terms of the decree. I would dismiss the appeal and affirm the order with costs.

*Appeal dismissed.*

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 April 29.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

HARSAHAI MAL AND OTHERS (DEFENDANTS) v. MAHARAJ SINGH  
 (PLAINTIFF).\*

*Determination of Title—Act XIX of 1863, ss. 8, 9—Res judicata.*

Where *M*, the recorded proprietor of an estate, applied to have his share of such estate separated, and an objection was made to such separation by *H*, another recorded proprietor of the estate, which raised the question of *M*'s proprietary right to a portion of his share, and the Collector proceeded under s. 8 of Act XIX of 1863 to inquire into the merits of such objection and decided that *M*'s interest in such portion of his share was that of a mortgagee and not a proprietor, and *M* did not appeal against such decision and it became final, *held*, in a suit in the Civil Court by *M* against *H* in which he claimed a declaration of his proprietary right to such portion, that a fresh adjudication of his right was barred.

THIS was a suit brought in May 1877, in which the plaintiff, who was in possession of a share of nineteen biswas and sixteen biswansis and a half in a certain village, claimed a declaration of his right as proprietor to four biswas and ten biswansis of this share. The defendants set up as a defence to the suit that they were the proprietors of the property in suit, and the plaintiff was only in possession of it as a mortgagee and not as a proprietor. The Court of first instance gave the plaintiff a decree, holding on the issue whether the plaintiff was the proprietor or the mortgagee of the property in suit that he was the proprietor of it.

The defendants appealed to the High Court, contending, with reference to certain partition proceedings under Act XIX of 1863 which are set forth in the judgment of the High Court, that the

\* First Appeal, No. 127 of 1878, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 28th June 1878.

Collector had in 1872 inquired into plaintiff's title and had declared that the plaintiff's interest in the property in suit was that of a mortgagee and not of proprietor, and the question of the plaintiff's title to such property was *res judicata* and could not be again tried.

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Mr. *Spankie*, with him the *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellants. The question of the plaintiff's title to the property in suit was raised in 1872 in the partition proceedings. The Collector under s. 8 of Act XIX of 1863 inquired into this question and declared the plaintiff's interest in the property to be that of a mortgagee. A decision passed by a Collector under that section is, under s. 9, to be held to be a decision of a Civil Court, and if not appealed from becomes final. The question of the plaintiff's title having been heard and finally determined by a Court of competent jurisdiction is a *res judicata*. It cannot be tried again in this suit.

Pandit *Bishambhar Nath*, with him Pandit *Nand Lal*, contended that the question of the plaintiff's title had not been decided by the Collector, and that a final decision under s. 8 of Act XIX of 1863 on a question of title was no bar to the question being raised again in a suit brought in the Civil Court.

The judgment of the Court was delivered by

PEARSON, J.—Having inspected the Collector's proceedings we are of opinion that the first ground of appeal is valid and must be allowed. It appears that the plaintiff's father applied for a partition of 19 biswas and 16½ biswansis share of the mauza under Act XIX of 1863, and that an objection was taken to this application by Har Sahai and the other defendants in the present suit on the ground that out of the share claimed by him 4½ biswas belonged to them in proprietary right and was in his possession only as a mortgagee. They demanded an inquiry into their objection and claim under s. 8 of the Act above mentioned; and the Collector ordered the Tahsildar to receive the evidence tendered by the parties in support of their respective claims and to submit a report on the point in dispute. The Tahsildar made a full inquiry and submitted a report; whereupon the Collector decided that the applicant for partition was only in possession of 15 biswas and 6

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biswansis as proprietor, the remaining  $4\frac{1}{2}$  biswas being held by him as mortgagee. There can be no doubt that his decision was an adjudication of a question of title or of proprietary right which, not having been set aside in appeal in the manner provided by s. 9 of Act XIX of 1863, became final, and bars any fresh adjudication of the question so decided. We have therefore no alternative but to allow the appeal and to dismiss the suit by reversal of the lower Court's decree with costs of both Courts.

*Appeal allowed.*

1879  
May 6.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spinkie.*  
MANNI KASAUNDHAN (PLAINTIFF) v. CROOKE, SECRETARY TO THE  
MUNICIPAL COMMITTEE OF GORAKHPUR (DEFENDANT).\*

*Act XV of 1873 (North-Western Provinces and Oudh Municipalities Act), ss. 40, 43—Suit against Secretary to Municipal Committee—Substitution of President as defendant—Act XV of 1877 (Limitation Act), s. 23.*

Where after the notice required by s. 43 of Act XV of 1873 had been left at the office of a Municipal Committee, such Committee were sued within three months of the accrual of the plaintiff's cause of action in the name of their Secretary, instead of in the name of their President, as required by s. 40 of Act XV of 1873, and the plaintiff applied to the Court more than three months after the accrual of his cause of action to substitute the name of the President for that of the Secretary, *held* that by reason of such substitution such suit could not be deemed to have been instituted against such Committee when such substitution was made, s. 22 of Act XV of 1877 applying to the case of a person personally made a party to a suit and not to the case of a Committee sued in the name of their officer, and that such substitution when applied for should have been made.

*Semle.*—S. 43 of Act XV of 1873 contemplates suits in which relief of a pecuniary character is claimed for some act done under that Act by a Committee, or any of their officers, or any other person acting under their direction, and for which damages can be recovered from them personally, and not a suit against a Committee for a declaration of the plaintiff's right to re-construct a building which had been demolished by the order of such Committee, and for compensation for such demolition.

THIS was a suit instituted on the 8th November 1877 against William Croke, Secretary to the Municipal Committee of Gorakhpur, in which the plaintiff claimed a declaration of his right to re-construct certain buildings which the Municipality had directed to be removed by an order dated the 2nd August 1877, and com-

\* Second Appeal, No. 1129 of 1878, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 28th June 1878, affirming a decree of Maulvi Azmat Ali, City Munsif of Gorakhpur, dated the 28th January 1878.

pensation for the removal of such buildings. Notice of the suit required by s. 43 of Act XV of 1863 was given in the Office of the Municipal Committee. On the 28th January 1878 the plaintiff prayed that the President of the Municipal Committee might be substituted as a defendant for the Secretary, as the suit should have been instituted against the President and not the Secretary. This application was refused by the Court of first instance. On the same date, which date had been fixed for the settlement of the issues, the Court of first instance dismissed the suit on the ground, amongst others, that the suit should have been instituted against the President of the Committee and not the Secretary, and that, even if the President had been substituted for the Secretary when application was made by the plaintiff in that behalf, the suit would not have been maintainable, regard being had to s. 43 of Act XV of 1873 and s. 22 of Act XV of 1877, as it would have been brought more than three months after the accrual of the plaintiff's cause of action. On appeal by the plaintiff the lower appellate Court concurred in the ruling of the Court of first instance.

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The plaintiff appealed to the High Court.

*Lala Lalta Parshad*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Parshad*), for the respondent.

The judgment of the Court was delivered by

SPANKIE, J.—The plaintiff appears to have made the Secretary, instead of the President, of the Municipal Committee, defendant. When he asked the Court to make the President defendant, it refused to do so, and the Courts have held that, though the suit as against the Secretary was in time, it was not so against the President, even if his name had been substituted for that of the Secretary, as it would have been brought more than three months after the accrual of the cause of suit (s. 43, Act XV of 1873).

Notice of the action required by s. 43 was given in the Office of the Municipal Committee. It is true that the suit ought to have been instituted against the Committee in the name of the President, and that if s. 22 of the Limitation Act applied, and the name of the Secretary had been struck out and that of the President added, more than three months would have elapsed from the accrual

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of the cause of action. But the suit is not against the President personally and s. 22, Act XV of 1877, seems to apply to new plaintiffs and defendants personally made parties to a suit after its institution rather than to cases like the present, where a committee is sued through their officer, and a clerical error is corrected by the Court, and the substitution as defendant of the proper officer for the wrong one might be permitted. It was an error of form only and not an act of wilfulness, and the Committee who are really sued have had full notice of action. Moreover the suits contemplated by the Act seem to be those claiming relief of a pecuniary character for some act done under the Act (XV of 1873) by the Committee, or any of their officers, or any other person acting under their directions, and for which damages can be recovered from them personally. The last paragraph of s. 43 bars all recovery if the person to whom the notice prescribed by the section has been given before the suit is brought tenders sufficient amends to the plaintiff.

The present suit is one to prove the right of plaintiff to build certain verandahs and a platform, which he avers were demolished by order of the Committee, and for which compensation is sought. It may be said that if notice to the Committee was required, it has been given, and that the Courts below should have substituted the name of the President in lieu of the Secretary and have tried the case on the merits. Substantially the requirements of the Act have been complied with, and the substitution of the name of the President for that of the Secretary is not affected by s. 22 of the Limitation Act, the suit against the Committee having practically been instituted within three months after the accrual of the cause of action.

On the other hand, if this is not one of the suits contemplated by Act XV of 1873, it is not at all affected by s. 43 of the Act, and would be certainly within time if the name of the President was substituted for that of the Secretary. Either way the substitution should be made and the case should be heard on the merits. We therefore decree the appeal, remand the case through the Judge to the first Court, for amendment of the plaint by the substitution in it of the President as provided by s. 40, Act XV of 1873, and for the disposal of the case on its merits. Costs to abide the result.

*Cause remanded.*

## CIVIL JURISDICTION.

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

1879  
May 7.

IN THE MATTER OF THE PETITION OF MULO.

*Sale in Execution of Decree—Return of Purchase-money to auction purchaser—Act X of 1877 (Civil Procedure Code), s. 315—Act VIII of 1859 (Civil Procedure Code).*

Where immoveable property was sold in the execution of a decree under the provisions of Act VIII of 1859, and the auction-purchaser, having been subsequently deprived of such property on the ground that the judgment-debtor had no saleable interest in it, applied under s. 315 of Act X of 1877 to the Court executing such decree for the return of the purchase-money, *held* that the Court could entertain the application.

THE facts of this case were as follows: On the 20th September 1877 a certain village was sold in the execution of a decree against Husaini Begam as her property, under the provisions of Act VIII of 1859, and was purchased by Nur Ahmad. Subsequently to this sale one Altaf Ali sued Nur Ahmad for the possession of the property and to set the sale aside on the ground that the property belonged to him, he having purchased it from Husaini Begam under a private sale before it was sold to Nur Ahmad by auction. He obtained a decree in this suit on the 30th January 1878, which the High Court affirmed on appeal on the 13th November 1878. Nur Ahmad thereupon applied to the District Judge of Bareilly, by whom the decree against Husaini Begam had been executed, for the refund of his purchase-money, on the ground that he had been deprived of the property by reason that Husaini Begam had no saleable interest in it. He made this application with reference to ss. 313 and 315 of Act X of 1877. The decree-holders objected to this application that it could not be entertained under Act X of 1877, as the sale had taken place while Act VIII of 1859 was in force and under its provisions, and that the latter Act did not provide for such an application in the execution of a decree, but left the auction-purchaser to institute a suit. The District Judge held that the provisions of s. 315 of Act X of 1877 were applicable to the case, and ordered the refund of the purchase-money.

Application, No. 3B of 1879, for revision of an order of W. Tyrrell, Esq., Judge of Bareilly, dated the 20th December 1878.

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The decree-holder applied to the High Court to set aside the order of the District Judge, under the powers conferred on it by s. 622 of Act X of 1877, on the ground that the District Judge had exercised a jurisdiction not vested in him by law.

Mr. Conlan, with him the *Junior Government Pleader* (Babu *Dwarkanath Banarji*) and *Munshi Hanuman Prasad*, showed cause.—The application by the auction-purchaser for the refund of the purchase-money was a fresh proceeding, and instituted after Act X of 1877 came into operation, and the District Judge was therefore competent to entertain it. In acting under the provisions of s. 622 of Act X of 1877, the High Court is not compelled to set aside every order that is made without jurisdiction. The order of the District Judge was just and equitable, and the High Court in the exercise of its discretion should allow it to stand.

Pandit *Ajudhia Nath*, with him Mr. *Colvin* and *Lala Latta Prasad*, for the petitioner.—The sale having taken place while Act VIII of 1859 was in force, and consequently under its provisions, the District Court could only deal with the purchase-money under the provisions of that Act. That Act does not contain any provisions for the refund of the purchase-money such as are contained in ss. 313 and 315 of Act X of 1877. In applying these sections and entertaining the application the District Judge acted without jurisdiction, and his order should be set aside.

The judgment of the Court was delivered by

PEARSON, J.—The Judge's order seems to be a very right, just and proper one, with which we ought not to interfere, unless absolutely bound to do so. The proceedings commenced under Act VIII of 1859 appear to have terminated with the sale. The application under s. 315 of Act X of 1877 may be regarded as a new proceeding. We are not prepared to say that the Judge could not entertain the application preferred to him under the second clause of s. 315, Act X of 1877; and we therefore decline to interfere, and dismiss this application with costs.

*Application dismissed.*

## APPELLATE CRIMINAL.

1879  
May 16.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, and Mr. Justice Oldfield.*

## EMPRESS OF INDIA v. LALAI.

*Act XXVI of 1870 (Prisons Act), ss. 3, 45, 54—Entering a Havalat with intent to convey food to Prisoner—Rules made by Local Government for the management and discipline of Prisons—House-trespass—Offence in relation to Prison—Act XLV of 1860 (Penal Code), s. 442—Previous Acquittal—Act X of 1872 (Criminal Procedure Code), ss. 454, 460.*

*Per SPANKIE, J., and OLDFIELD, J. (STUART, C.J., doubting) that a havalat (lock-up) is a prison within the meaning of the Prisons Act.*

*Per STUART, C.J., that food is not an "article" within the meaning of s. 45 of that Act.*

*Per STUART, C.J., and OLDFIELD, J., that the conveyance of food into a havalat, not being expressly prohibited by the rules made by the Local Government under s. 54 of that Act for the management and discipline of prisons, is not "contrary to the regulations of the prisons" within the meaning of s. 45 of that Act, and is therefore not an offence punishable under section.*

*Held therefore per STUART, C.J., and OLDFIELD, J., that where a person entered into a havalat with intent to convey or attempt to convey food to an under-trial prisoner, such Act on his part did not amount to house-trespass within the meaning of s. 442 of the Indian Penal Code and it was not an act punishable under s. 45 of the Prisons Act.*

*Per SPANKIE, J., contra.*

*Per STUART, C.J., that the fact that such person had been tried for house-trespass and acquitted was no bar to his being tried subsequently for an offence under s. 45 of the Prisons Act.*

THESE were appeals by the Local Government from two judgments of acquittal of Mr. C. Daniell, Sessions Judge of Gorakhpur, dated the 31st May 1878 and 24th August 1878 respectively. The facts of these cases are sufficiently stated for the purposes of this report in the judgments of the Division Bench (STUART, C.J., and SPANKIE, J.) before which the appeals came for hearing.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

Munshi Kashi Prasad, for the respondent.

The Junior Government Pleader.—The term "prison" is used in s. 3 of the Prisons Act, 1870, to mean "any gaol or



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penitentiary, and include the airing-grounds or other grounds or buildings occupied for the use of the prison." The word "gaol" means a place of confinement for persons legally committed to it for crime or for persons committed to it for trial—Webster's Dictionary.—"Havalat" is a Persian word meaning "safe custody." The "havalat" in Gorakhpur is under the charge of the Superintendent of the District gaol. Lalai, by attempting to supply cooked food to an under-trial prisoner confined to the havalat committed the offence described in s. 45 of the Prisons Act. Under that section whoever, contrary to the regulations of the prison, conveys or attempts to convey, any letter or other article not allowed by such regulations, into or out of any such prison, shall, on conviction before a Magistrate, be liable to rigorous imprisonment for a term not exceeding six months, or to fine not exceeding two hundred rupees, or to both. The Local Government, by virtue of the power given to it under s. 54 of the Act, is empowered to make rules consistent with the Act as to the food and clothing of criminal prisoners, and according to s. 3 of the Act "criminal prisoner" means a person charged or convicted of a crime. Ch. 29 of the rules framed by the Local Government refers to prison dietary, and these include the diet scale for native non-labouring prisoners, and rule 418 provides that prisoners under trial shall receive the non-labouring prisoner's rations of the gaol, and the non-labouring ration is wheat-flour (second quality) *bajra*, *dal*, vegetables, oil or *ghi*, firewood, chillies, salt. It is submitted that under these rules an under-trial prisoner is not entitled to get any thing besides what is laid down for his ration in the above rules. He is not entitled to procure cooked food from home. True it is that he can cook his own food in gaol, unlike the convict prisoner who is not allowed that privilege, but he cannot get food prepared for him outside the gaol. Inasmuch then as a punishment is provided for the breach of any of the prison rules, any person who does offend against any of those rules commits an offence, as that term is defined in s. 2, Act XXVII of 1870. Lalai entered the havalat intending to give an under-trial prisoner food, that is to say, with intent to commit an offence, and thereby committed the offence of criminal trespass as defined in s. 441 of the Indian Penal Code, the punishment for which offence is provided in s. 448 of the Code. The first conviction therefore of the defendant by the Assistant Magistrate under s. 448

of the Indian Penal Code was good and valid and should not have been quashed on appeal.

Munshi *Kashi Prasad*, for the respondent, contended that a *havalat* was not a prison within the meaning of the Prisons Act. *Havalats* are places which do not form part of the prisons. They existed before the Act was passed and the Act does not mention them. The prison rules do not expressly prohibit under-trial prisoners from procuring cooked food from outside. Such prisoners can cook their own food, and the prisoner in this case might have prepared "*puris*" for himself. There is no reason then why they should not be prepared outside the gaol and given to him.

The *Junior Government Pleader* in reply.—Prisoners can only provide their food out of the rations given to them by the gaol authorities, and as they are not able to procure any food for themselves from outside the gaol, it is an offence against the prison regulations to take food inside the gaol.

The following judgments were delivered by the Division Bench :

STUART, C.J.—These are two appeals by the Government against two acquittals of the same respondent, and on the same facts, although under different charges or different denominations of crime. The facts common to both cases are these:—On or about the 29th April 1878 an *oetroi muharrir*, otherwise called a *chungi muharrir*, had been sent to the *havalat* at Gorakhpur on a charge of embezzlement. On the following day the accused Lalai in company with his brother named Lochan, an *oetroi chaprasi*, came to the *havalat* about 12 o'clock noon and asked the head-constable, Bakhtawar Khan, who was in charge of the guard, to allow them to give some food to the *chungi muharrir* who was confined there; this the head-constable refused and told the accused and his brother Lochan to go away. About half an hour after an alarm was raised by a constable on duty that some one was on the top of the *havalat* wall where there is a platform for the police sentry. The police were sent to the spot and the prisoner was taken. On being searched there, there was found on him a packet of "*puris*" (wheat-cakes fried in *ghi* or oil) and vegetables, and these together were the food which the accused and his brother attempted to give to the *oetroi muharrir*. On these facts the accused Lalai was

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first charged with house-trespass under s. 448, Indian Penal Code, and tried before and convicted of that offence by the Joint Magistrate, and sentenced to rigorous imprisonment for three months. On appeal to the Judge the Magistrate's order was reversed, the appeal allowed, and the accused ordered to be discharged; the Judge's order to that effect was dated 31st May 1878. Subsequently and on the same facts the accused respondent was tried before the Deputy Magistrate of Gorakhpur on a charge preferred under s. 45 of the Prisons Act XXVI of 1870, and convicted and sentenced on the 19th August 1878 to rigorous imprisonment for three months, but on appeal to the Judge the Magistrate's order was reversed and the prisoner again released from custody.

It would be convenient to notice and dispose this second appeal first. But before considering the merits in this second appeal, I would notice an objection in the way of a plea of *res judicata*, and which objection was allowed by the Judge. "In this case," he said, "I consider that there can be no doubt that appellant has been imprisoned for committing the same offence for which he was tried and sentenced on 15th May 1878, and released on appeal on 31st May. Under these circumstances his second trial and imprisonment for the same offence must be quashed under s. 460 of the Criminal Procedure Code." In this opinion I do not concur. By the second paragraph of s. 460 it is provided that a person convicted or acquitted of any offence may afterwards be tried for any other offence for which a separate charge might have been made against him on the former trial. Under s. 454, Criminal Procedure Code, first paragraph which provides that "if in one set of facts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time;" s. 460, however, providing that this may be done "afterwards." The Judge's objection therefore of *res judicata* or of *autrefois acquit*, as they would call it in English criminal pleading, fails, and the second prosecution and all that followed upon it were perfectly valid.

But on the merits I am of opinion that it is too doubtful a case to justify Lalai's conviction. Lalai was charged under s. 45 of

Act XXVI of 1870 of an offence against the Prisons Act, in that he had taken to the havalat and attempted to give to the octroi muharrir food contrary to the prison regulations. Now a conviction on such a charge involves two things: first, that the havalat is a prison within the meaning of that term in s. 3 of Act XXVI of 1870, and secondly, that the act of introducing food into a prison is prohibited by the prison regulations and therefore an offence. With reference to the first point a prison is by s. 3, Act XXVI of 1870, defined to mean "any gaol or *penitentiary*, and includes the airing-grounds or buildings occupied for the use of the prison," meaning by a gaol or penitentiary, as I understand those terms, a place of permanent confinement for a fixed and definite period, and not a mere place of temporary or preliminary custody, which appears to be the meaning of the term havalat. I observe that Act XXVI of 1870, s. 30, makes a clear distinction between criminal prisoners before trial and "convicted prisoners" and very properly, because the ultimate condition of the former class has yet to be determined. I am therefore rather of opinion that a havalat is not a prison within the meaning of s. 3, Act XXVI of 1870. As regards the second point, and assuming that a havalat is a prison as defined by s. 3, Act XXVI of 1870, I doubt very much whether the act of introducing food into a havalat in the way alleged in this case was an offence against the prison regulations. Such an act cannot, I consider, be deemed to be such an offence unless it can be shown to be so against some prohibitory law or regulation. Now I can find nothing of that character either in Act XXVI of 1870 or in the rules for the management and discipline of prisoners adopted under the Act. This conviction appears to proceed on s. 45 of the Act, clause 3, where it is provided that "whoever contrary to such regulations (of the prison) conveys or attempts to convey *any letter or other article not allowed by such regulations* into or out of any such prison or place" shall, on conviction, be liable, &c. The question thus at once arises whether the food attempted to be taken into the havalat by the accused was an "article" within the meaning of this section. According to the principles upon which statute laws are usually interpreted "article" here would mean something of the same kind with a letter such as other documents or a newspaper or a book or other

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matter brought to the accused in a printed or written form, and whatever else may have been intended, food does not necessarily come within the category, and this being a criminal case, we are not to determine against an accused person what is not plainly expressed or necessarily implied. Then as to the prison regulations, I was referred to No. 418 which is one of the rules relating to prisoners under-trial (and I presume received into havalat for that purpose). This rule provides that such prisoners shall receive the non-labouring rations of the gaol with certain additions of *ghi* and mustard oil. I was also referred to rule 524 which prescribes a dietary for native prisoners with a suggestion that such was the food the prisoners were to receive, and no other. That may have been the intention of the rule, but such intention is nowhere expressed, nor can I find any prohibition whatever against a friend of a prisoner in custody before trial and not after conviction doing what is here charged against Lalai. And again, I say we must not forget that this is a criminal case in which the presumption is against guilt, and we are not to assume that guilt without some express rule to the contrary, or without evidence which necessarily and irresistibly shows or, it may be, implies the accused's complicity. In fact these prison regulations merely prescribe the diet that is to be given to different classes of prisoners without any other meaning in a penal sense, and there is nowhere in any of them any rule or order against such a contribution to a prisoner's food as Lalai attempted in the present case. It is also to be observed that Lalai and his brother came openly in the first instance to the havalat, and requested permission of the head-constable to give their friend who was in custody then a little food. This was refused, but it does not appear that Lalai was then informed that what he asked permission to do was against the rules of the havalat, much less that it was a criminal offence to give a little *puri* to a prisoner there. It may, as I have suggested, be reasonable to believe and to imply that the diet detailed in a prison regulations was to be all the food that the prison authorities were to provide, but it does not therefore follow that what was here done was a criminal violation of the regulations, unless we are to read s. 45 of the Act otherwise than I have done and so as to include within its sanction what Lalai attempted. But I repeat this is a

criminal case and everything charged against the accused should, to justify his conviction, be clearly shown to be contrary to express law, and not merely to be implied by any covert inference, however reasonable unless it be irresistible.

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For all these reasons I consider the validity of Lalai's conviction under Act XXVI of 1873 is too doubtful, and I would quash it.

This, so far as my judgment is concerned, determines the second appeal before us, and I shall now proceed to dispose of the other or first appeal, and with a like result. The legality of the conviction in this first appeal depends on the solution of the question whether what Lalai did was an "offence" within the meaning of s. 40 of the Indian Penal Code and Act XXVI of 1870. That question I have already determined by the opinion I have expressed in the second appeal to the effect that what Lalai did was not an offence as that term is so defined, or what is the same thing, that what he did was of too doubtful a character to necessitate conviction as an offence. That being so, Lalai was neither guilty of criminal trespass nor of house-trespass, the *intent* to commit an *offence* being essential under both sections. I would therefore disallow the appeal and affirm the order of the Judge in both these respects.

SPANKIE, J.—It appears to me that on the facts found Lalai Ahir did commit the offence of criminal trespass. It was established by the evidence that an octroi muharrir had been sent to the havalat at Gorakhpur in custody on a charge of embezzlement. The next day Lalai Ahir came to the havalat about noon and asked the head-constable in charge of the guard to allow him to give some food to the muharrir. The head-constable refused to do so and warned him off. Sometime afterwards an alarm was raised that some one was on the top of the havalat wall, where there is a platform for the police sentry. Constables were sent to the spot and Lalai Ahir was caught. On being searched, a packet of "*puris*" and vegetables were found on his person. The Assistant Magistrate being of opinion that a havalat does not come under the definition of a prison within the terms of s. 3, Act XXVI of 1870, convicted Lalai Ahir on the charge of house-trespass under

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s. 448, Indian Penal Code. The Sessions Judge considered that no offence had been committed. Lalai had entered the havalat for the purpose of giving food, and the giving food under such circumstances was not punishable by law. He therefore annulled the conviction.

Under s. 441, Indian Penal Code, whoever commits criminal trespass, by entering into or remaining in any building, tent, or vessel used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property, is said to commit house-trespass. This havalat or lock-up is certainly a place used as a human dwelling. Its officers, guards, and persons accused of offences occupy it as a dwelling place. The introduction of any part of the trespasser's body is entering and sufficient to constitute house-trespass. But the trespass must be criminal. Under s. 441, Indian Penal Code, whoever enters into or upon property in the possession of another, with intent to commit an offence, or to intimidate, insult, or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence is said to commit criminal trespass. Now Lalai Ahir himself was a constable enrolled under the Police Act, and a public servant. Presumably he was quite aware that he was entering a place in which parties accused of offences were kept in custody, and that the head-constable of the guard was only doing his duty when he refused to allow him to give food to a person in custody and warned him to leave the premises, which he did do. But instead of keeping away, he managed to effect another entry and was caught. After due warning from the head-constable in charge of the building who was lawfully in possession of it, that he could not be allowed to give food to a person in custody therein, and after being told to leave the building, he is found after a short interval on the top of the wall with the food and vegetables, which he was told could not be given to the prisoner, concealed on his person. We must judge of his intent from his conduct, and it appears to me that his re-entry into the lock-up was, on the facts established, made with an intent to commit an offence against prison regulations and rules, and thereby an offence against the Prisons

**Act.** If he had no such intention, why did he conceal the food, and re-enter a building which he had been told to leave?

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There cannot I think be a doubt that to secretly introduce food into the lock-up was an offence against the Prisons Act and therefore the offence of criminal trespass was committed, and on the facts found, which are also beyond a doubt, the offence of house-trespass was also committed. The conviction therefore under s. 448 might have been sustained by the Sessions Judge. But if there had been any room for doubt, the second conviction under s. 45 of Act XXVI of 1870 appears to have been good. I cannot admit that a *havalat* or lock-up is not a prison within the meaning of the Act. In s. 3 prison means any gaol or penitentiary, and includes the airing-grounds or other grounds or buildings occupied for the use of the prison. Criminal prisoner means any prisoner charged with or convicted of a crime. By s. 4 the Local Government is to provide for prisoners accommodation in a prison or prisons constituted and regulated in such manner as to comply with the requisitions of this Act in respect to the separation of prisoners. By s. 30, cl. 3, criminal prisoners *before trial* shall be kept apart from convicted prisoners. By ss. 34 and 35 a civil prisoner may maintain himself but is not allowed to sell any part of his food, clothing, bedding or necessaries to any other prisoner. By s. 45 whoever, contrary to the regulations of the prison, conveys, or attempts to convey, any letter or other article not allowed by such regulations into the prison, is liable on conviction to rigorous imprisonment for a period not exceeding six months, or to a fine not exceeding Rs. 200, or to both. By s. 54 the Local Government may make rules consistent with the Act, amongst others, as to the food and clothing of criminal prisoners. The Government has exercised such powers, and rule 417 allows prisoners under trial to cook their own food, and directs that they shall be subjected to no further restraint than is absolutely necessary for their safe custody. Rule 418 directs that these prisoners under trial shall receive the non-labouring rations of the jail, with the addition of two chittaks of *ghi* or mustard oil to each group of 25 prisoners, the oil to be given with their vegetables and the *ghi* with their *dál*. So that the food they are allowed to cook is not food which they purchase for themselves, but food which is supplied



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as rations. The head of a prison is the Superintendent (s. 7 of the Act), and the Inspector-General of Prisons for the North-Western Provinces has been vested with the general control and superintendence of all prisons situate in the territories under the Government, North-Western Provinces (s. 6). By the 424th rule made by the Government, the Inspector-General of Prisons is to exercise a legitimate watchfulness over the numbers and excessive detention of prisoners confined in the havalats under his inspection, and to call the attention of Government to the subject if circumstances necessitate this action. The classification of gaols in the North-Western Provinces authorized by the Government includes (i) Central Prison, (ii) 1st class District gaols, (iii) 2nd class District gaols, (iv) 3rd class District gaols, (v) 4th class District gaols, (vi) lock-ups (1). But it may be said that these lock-ups are within the prisons, and persons committed for trial by the Magistrate are confined therein, and that the term lock-up does not include the Magistrate's havalat. This however is not the case, as Rule 14, p. 18 of the work just cited above, directs that—"In lock-ups shall be confined all the prisoners under trial before any Court, unless, where the lock-up is separate from the District gaol, the Magistrate or committing officer may think it necessary for greater security to send any prisoner committed to the Sessions to the District gaol. On the 27th August 1864 the Lieutenant-Governor was pleased to approve of the proposal that all the "havalats" (lock-ups) in the North-Western Provinces should be placed under the supervision of the Inspector-General of Prisons from 1st May 1865 (2). The resolution also approved of the suggestions made by the Inspector-General of Prisons regarding the diet and clothing to be supplied to prisoners under trial.

The Magistrate of Gorakhpur reports to this Court that up to 1862 the gaol and lock-up were under charge of the Magistrate of the District. In 1862 the gaol was placed under charge of the Civil Surgeon as Superintendent. But the lock-up remained as before in charge of the Magistrate. In 1864 it was placed under the supervision of the Inspector-General of Prisons under the Government order dated 27th August 1864 quoted above, and in 1868 it was also

(1) Rules for the management and discipline of prisons authorized by Government, North-Western Provinces, published at Allahabad in 1874.

(2) General Department, No. 2663A. of 1864, dated Naini Tal, the 27th August 1864.

placed under the supervision of the medical officer in charge of the district gaol by order dated 28th July 1868(1).

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It appears therefore to be quite certain that the Magistrate's *havalat* or lock-up is, under the rules which the Local Government is authorized by s. 54 of the Act to make, a fifth class gaol within the meaning of prison as defined in s. 3 of the Act, and therefore if the accused committed any breach of the regulation in force and authorized to be made by the Prisons Act, the conviction would be legal, if had under s. 45 of the Act. On the merits there can be no doubt that the facts proved in the second case show that an attempt was made to introduce to a prisoner charged with an offence articles of food not allowed by the regulations. I would therefore decree the appeal and reverse the decision of the Sessions Judge and re-affirm the conviction and sentence passed under s. 45 of Act XXVI of 1870.

I would also decree the appeal in the house-trespass case, but as the subsequent conviction by the Magistrate has been affirmed in the other case, I do not think it necessary to do more than reverse the Sessions Judge's order and to approve the conviction of the Assistant Magistrate. There does not appear to be any necessity for pressing the sentence against the accused under s. 448, Indian Penal Code, and it might be remitted.

The learned Judges of the Division Bench having differed in opinion, the case was consequently referred to Oldfield, J., under s. 271B. of Act X of 1872.

OLDFIELD, J.—I will first deal with the offence under s. 45 of Act XXVI of 1870.

The definition of the word prison in s. 3 of that Act appears to me to include a *havalat* or lock-up in which prisoners under trial are confined. That such was the intention of the Act would appear from the definition of criminal prisoner in s. 3, which "means any prisoner charged with or convicted of an offence," and by the Act treating of prisoners under trial as well as conviction. It is unnecessary, however, for me to determine this point, for assuming that an offence against the prison regulations of the nature of

(1) Government, North-Western Provinces, Circular No. 9A. of 1868, No. 148A. of 1868, to all Commissioners of Divisions, dated Naini Tal, 28th July 1868.

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those provided for in s. 45 committed with reference to a prisoner under trial confined in the havalat will be an offence under s. 45, I am unable to hold that such an offence has been committed in this case. The offence alleged against the accused is that he conveyed or attempt to convey some food to a man confined in the havalat and under trial, and by doing so has contravened s. 45 of Act XXVI of 1870, which provides, *inter alia*, that "whoever, contrary to such regulations (*i.e.*, the regulations of the prison), conveys or attempts to convey, any letter or other article not allowed by such regulations into or out of any such prison or place, shall on conviction before a Magistrate be liable to rigorous imprisonment for a term not exceeding six months, or to fine not exceeding Rs. 200, or to both." Before, however, a conviction can be had under this part of s. 45, it must be shown that to convey food to a prisoner in the havalat is contrary to the regulations of the prison. Now the only regulations on the subject to which we are referred is rule 418 of Rules for the management and discipline of prisoners in the North-Western Provinces issued under the authority of Government under s. 54 of the Prisons Act. This rule refers to prisoners under trial and amongst other provisions provides that "they shall receive the non labouring rations of the gaol with the addition of two chittaks of *ghi* or mustard-oil to each group of 25 prisoners, the oil to be given with their vegetables, and the *ghi* with their *dal*;" and the authorised scale of dietary is laid down in rule 524.

It is urged that, inasmuch as these rules provide a particular ration of food to be supplied by the prison authorities, it is contrary to the regulations to convey any food to such prisoners, and to do so will amount to the offence contemplated in s. 45. But this contention cannot, in my opinion, be maintained. To render the act of conveying, or attempting to convey, any articles to a prisoner in havalat penal, it must be shown distinctly that there is a regulation which prohibits it. The rules in question merely deal with the articles of food which such prisoners are to receive from the prison authorities; they contain no prohibition against their receiving any other supplies of food, or any prohibition against any person conveying or attempting to convey food to them; and we are not at liberty to make assumptions or introduce prohibitions not contained in the regulations. We cannot hold that an act done

by a person is "contrary to the regulations" merely because it is something not affirmatively allowed by the regulations. I hold therefore that the conviction under s. 45, Act XXVI of 1870, cannot be maintained, and it will follow that there can be no conviction of the offence of house-trespass or criminal trespass, since it cannot be shown that there was the intent required to constitute criminal trespass. It is not urged that there was an intent to commit an offence punishable under the Penal Code, and there was none to commit an offence punishable under special or local law, since the only offence under such a law to which such an intent could be referred is the offence under s. 45, Act XXVI of 1870, which in my opinion is not proved in this case.

I therefore affirm the order of the Judge in both the appeals before this Court.

*Appeals dismissed.*

## APPELLATE CIVIL.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.*

SURJAN SINGH (DEFENDANT) v. JAGAN NATH SINGH (PLAINTIFF).\*

*Mortgage—Property situated partly in Oudh and partly in the N.-W. P.—*

*Foreclosure—Regulation XVII of 1806, s. 8.*

Where a mortgage of land situated partly in the District of Sháhjahánpur in the North-Western Provinces and partly in the District of Kheri in the Province of Oudh was made by conditional sale, and the mortgagee applied to the District Court of Sháhjahánpur to foreclose the mortgage and render the conditional sale conclusive in respect of the whole property, and that Court granted such application, *held*, with reference to the ruling of the Privy Council in *Ras Muni Dibiah v. Pran Kishen Das* (1), that, where mortgaged property is situated in two Districts, an order of foreclosure relating to the whole property may be obtained in the Court of either District, that the circumstance that Oudh was in some respects a distinct Province from the North-Western Provinces did not take the case out of the operation of that ruling, inasmuch as Regulation XVII of 1806 was in force in Oudh as well as in the North-Western Provinces at the time of the foreclosure proceedings.

THIS was a suit to have a conditional sale dated the 16th November 1866 declared absolute, and to obtain the possession of

\* First Appeal, No. 166 of 1878, from a decree of Maulvi Zain-ur-Abdín, Subordinate Judge of Sháhjahánpur, dated the 29th August 1878.

(1) 4 Moore's Ind. App., 392.

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1879      the land mortgaged. The mortgaged land was situated partly within the District of Sháhjahánpur in the North-Western Provinces, and partly within the District of Kheri in the Province of Oudh. The application to foreclose the mortgage and render the conditional sale conclusive in respect of the whole property was preferred to the District Court of Sháhjahánpur. That Court served the mortgagors, through the District Court of Kheri, with the notice of foreclosure require by s. 8 of Regulation XVII of 1806. The present suit was instituted in the Court of the Subordinate Judge of Sháhjahánpur. The defendants contended, *inter alia*, that the District Court of Sháhjahánpur was not competent, in respect of the land situated in the District of Kheri, to grant the application for foreclosure, such land being situated beyond the local limits of its jurisdiction, and consequently the foreclosure proceedings in respect of such land were invalid, and the suit in respect thereof was not maintainable. The Subordinate Judge held that the District Court of Sháhjahánpur was competent to grant the application for foreclosure in respect of the land situated in the District of Kheri, and the foreclosure proceedings were valid in respect of such land, and gave the plaintiff a decree.

The defendant appealed to the High Court raising the same contention as to the validity of the foreclosure proceedings as he had raised in the Court below.

Mr. Conlan and Munshi Sukh Ram, for the appellant.

Mr. Colvin and the Junior Government Pleader (Babu Dwarka Nath Banarji), for the respondent.

The judgment of the Court was delivered by

PEARSON, J.—The first and last of the pleas in appeal are not pressed and are indeed admitted not to be tenable. The second plea is over ruled, in reference to the Privy Council's ruling in the case of *Ras Muni Dibiah v. Pran Kishen Das* decided on the 27th June 1848 (1), that, according to s. 8, Regulation XVII of 1806, where mortgaged property is situate in two Districts, an order of foreclosure relating to the whole property may be obtained in the Court of either District. The circumstance that Oudh is in

(1) 4 Moore's Ind. App., 392.

some respects a distinct Province from the North-Western Provinces does not, in our opinion, take the case out of the operation of that ruling, inasmuch as Regulation XVII of 1806 was in force in Oudh as well as in the North-Western Provinces at the time of the foreclosure proceedings. The appeal is dismissed with costs.

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*Appeal dismissed.*

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

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May 23.

JAMNA (PLAINTIFF) v. MACHUL SAHU (DEFENDANT).\*

*Hindu Widow—Maintenance.*

A wife is, under the Hindu law, in a subordinate sense, a co-owner with her husband: he cannot alienate his property, or dispose of it by will, in such a wholesale manner as to deprive her of maintenance.

*Held* therefore, where a husband in his lifetime made a gift of his entire estate leaving his widow without maintenance, that the donee took and held such estate subject to her maintenance.

THIS was a suit, instituted in April 1877, for a declaration of the plaintiff's right to an allowance for her maintenance of Rs. 25 per mensem. The plaintiff was the widow of Ramjewan, and the defendant was Ramjewan's nephew, to whom Ramjewan had in his lifetime, shortly before his death, made a gift of all his real and personal estate, under which the defendant had acquired possession of such estate in Ramjewan's lifetime. The material portion of the deed of gift, which was dated the 8th January 1850 was as follows: "I have made a gift of my whole and entire property and possessions in lands, capital, houses made of bricks and mud situated in the city aforesaid, both ancestral and mortgaged, &c., money, ornaments, vessels, carpets, cash, &c., such as fall under the denomination of, and are called, property, constituting my whole estate and right, to Machul, son of Munna Lall and my nephew, who carries on the business of the firm jointly with me, and whom in absence of a son I have adopted as my son: I have made him its proprietor and my representative: the gift is valid, and lawful,

\* Second Appeal, No. 1027 of 1878, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 1st June 1878, affirming a decree of Pandit Jagat Narain, Subordinate Judge of Jaunpur, dated the 11th May 1877.

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it vests property and is just and proper : it is made in the form of *sila* (gift to a relative) without any dispute, and without any consideration or hopes (from the donee) : it is unconditional and free from vicious and false conditions : I have put the said donee in possession, in my place, in respect of the whole and entire property the subject of the gift aforesaid, which is free from all defects and disputes : I have exempted this gift wholly from any claim of resuming it : the said donee may realize by virtue of this deed all that is due from the tenants on account of immoveable property and the money due, and may enjoy and possess the villages under *sur-i-peshgi* lease, &c., by having his name recorded in respect of the same : in short he may enjoy and possess all the villages sold and mortgaged to, or taken on farm or purchased at auction and held by, me : after my death none of my heirs shall, for any reason or cause, have any right, claim, or cause of action thereto : and as the said donee has accepted the said gift and transfer of property, these few lines have been executed in the shape of gift and assignment of proprietary right, which may serve in evidence when required."

The defendant set up as a defence to the suit that he was not bound to maintain the plaintiff, and that Ramjewan had provided for the plaintiff's maintenance by gifts of money and jewels. The Court of first instance held that, inasmuch as the defendant had not succeeded to the estate of Ramjewan by inheritance, and inasmuch as the deed of gift did not provide for the plaintiff's maintenance, and the defendant had not entered into any agreement to maintain her, the defendant was not legally bound to maintain the plaintiff. The Court of first instance accordingly dismissed the suit, without determining the second issue raised by the defence, observing that the plaintiff might have impugned the gift on the ground that no provision had been made for her maintenance, had she not acquiesced in its validity for so long a period of time. On appeal by the plaintiff the lower appellate Court affirmed the decision of the Court of first instance, observing with reference to the second issue raised by the defence, that the great delay which had occurred in the institution of the suit supported the defendant's assertion that the plaintiff's husband had made a provision for her.

The plaintiff appealed to the High Court, contending, amongst other things, that she was entitled to be maintained out of her husband's estate, and that the defendant was equitably bound to maintain her, it not being shown that any provision had been made for her maintenance by her husband.

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The *Senior Government Pleader* (*Lala Juala Prasad*), for the appellant.

*Munshi Hanuman Prasad*, *Pandit Bishambhar Nath*, and *Lala Jokhu Lal*, for the respondent.

The following judgments were delivered by the Court :

PEARSON, J.—The lower Courts have disallowed the plaintiff's claim to be maintained out of her husband's estates given by him on the 8th January 1850, shortly before his death, to the defendant, who was his nephew and partner in business, and who is stated in the deed of gift to have been adopted by him as a son, on the ground that, under the terms of that instrument, which bestows the whole estate on him without exception, reservation, or condition, she has no right to what she claims. I am not prepared to hold that the deed has been misconstrued, but the second ground of the appeal appears to me to be valid. A wife is, under the Hindu law, in a subordinate sense a co-owner with her husband; he cannot alienate his property or dispose of it by will in such a wholesale manner as to deprive her of maintenance; and I am therefore of opinion that the donee of the entire estate must be deemed to have taken and to hold it subject to her maintenance. This opinion is supported by the remarks at p. 366 of West and Bühler's *Hindu Law of Inheritance and Partition*, 2nd ed., and the Privy Council decision dated 30th November and 2nd December 1852 in the case of *Sonatun Bysack v. Sreemutty Juggutsoondree Dassee* (1), and by a judgment of the Madras High Court dated 27th October 1860, in which a sale of a piece of land by a Hindu was set aside on his wife's suit on the ground that it left her without maintenance.

The plea that provision was made for the maintenance of the plaintiff in the present case by her husband in the shape of an

(1) 8 Moore's Ind. App., 66.



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assignment of cash and jewels seems inconsistent with the terms of the deed, and the lower Court's finding that his entire 'estate was without exception or reservation given to the defendant, but the Courts below have not distinctly adjudicated upon it. I would direct the lower appellate Court to adjudicate on that plea, and, if it should disallow it, to proceed to determine whether Rs. 25 per mensem, or what monthly amount, would be a suitable allowance for the plaintiff's maintenance. The lower appellate Court should be instructed to submit its findings, when a week might be allowed for objections.

SPANKIE, J.—I agree with my learned and honorable colleague's proposal to refer the issue laid down above for determination by the lower appellate Court.

*Cause remanded.*

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May 26.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.*

GULAB DAI (PLAINTIFF) v. JIWAN RAM AND OTHERS (DEFENDANTS).\*

*Failure of Plaintiff to pay Court-fee for issue of Summons—Non-appearance of Defendant—Act VIII of 1859 (Civil Procedure Code), s. 110—Act XXIII of 1861, s. 5, 7—Fresh suit—Act X of 1877 (Civil Procedure Code), s. 99.*

Where the plaintiff in a suit failed to deposit the *talabana* required for the purpose of issuing summonses to certain persons whom it was proposed to make defendants in addition to the original defendants in such suit, and the Court on that ground irregularly dismissed such suit as against such original defendants by an order purporting to be made under s. 110 of Act VIII of 1859, on a day previous to that fixed for the hearing of such suit, *held* that such order of dismissal did not preclude the plaintiff from instituting a fresh suit.

THE facts of this case were as follows: On the 3rd August 1866 one Radha Kishen instituted a suit against one Lachman Das and certain other persons in the Court of the Munsif for the possession of certain land. The 23rd August 1866 was fixed for the settlement of issues in this suit. On that date no issues were fixed, but the Munsif made an order which had reference to the addition of other persons as defendants in the suit. On the 27th August 1866 the pleader for the plaintiff applied that certain persons whom he named might be made defendants in the suit, and

\* Second Appeal, No. 955 of 1878, from a decree of R. M. King, Esq., Judge of Meerut, dated the 29th June 1878, affirming a decree of Munshi Ram Lal, Munsif of Ghaziabad, dated the 19th February 1878.

that summonses might be served on them. The Munsif consented to this application and fixed the 23rd September 1866 for the next hearing of the case. On the 30th August 1866 it having appeared that the pleader for the plaintiff had endorsed on the summonses which were to be served on the new defendants that the plaintiff would not deposit the Court-fees requisite for the service of such summonses, and that he (the pleader) could not proceed, the Munsif made the following order: "Whereas it appears that the plaintiff has made a default, it is therefore ordered that the suit be dismissed under s. 110." On the 21st March 1878 Gulab Dai, the representative of Radha Kishen, instituted a fresh suit against the representatives of Lachman Das and the other persons for the possession of the same land, claiming under the same title as Radha Kishen had claimed in the former suit. The Court of first instance determined the suit on its merits, and dismissed it. On appeal by the plaintiff the lower appellate Court held, looking at the circumstances of the former suit, that the order dismissing the former suit should be taken to have been made under the concluding portion of s. 97 of Act VIII of 1859, and that such order consequently was a bar to the fresh suit.

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The plaintiff appealed to the High Court, contending that the order dismissing the former suit should be taken to have been an order made under s. 5 of Act XXIII of 1861, and the plaintiff was entitled, with reference to s. 7 of that Act, to institute a fresh suit.

Pandit *Nand Lal*, for the appellant.

Pandit *Bishambhar Nath* and Babu *Oprokash Chandar Mukerji*, for the respondents.

The judgment of the Court was delivered by

PEARSON, J.—The lower appellate Court's finding that the former suit was withdrawn by the plaintiff is, in our opinion, an incorrect construction of the fact. The fact is that she failed to deposit the *talabana* required for the purpose of issuing summonses to certain persons who it was proposed to make defendants in addition to the original defendants in the suit. The proper course for the Munsif to have pursued was to have proceeded with the suit on the date fixed for hearing and to have disposed of it in respect of the original defendants. Instead of so doing, he precipitately

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dismissed it as against them for the default aforesaid, which did not apply to them, on a day previous to that fixed for the hearing, in reference to the provisions of s. 110, Act VIII of 1859, which were wholly inapplicable. Had they been applicable the order of dismissal would not have precluded the institution of a fresh suit within the period allowed by law. It is true that the provisions of s. 5, Act XXIII of 1861, were also inapplicable to the circumstances, but the default for which the suit was dismissed by the Munsif was of the same nature as that contemplated by that section; and it is observable that the dismissal of a suit under that section does not preclude the institution of a fresh suit within the time allowed by the law of limitation. It would be hard to hold that the plaintiff should have been deprived of a right which she would have been free to exercise if her suit had been dismissed under s. 110, Act VIII of 1859, or s. 5, Act XXIII of 1861, not because she committed a greater fault than is punishable under those laws, but because the Munsif committed a strange irregularity which the Legislature had not anticipated and for which it has not made any express provision. It would be more just and reasonable to apply the spirit of s. 7, Act XXIII of 1861, which has been re-enacted in s. 99 of the new Procedure Code. It is not found by the lower appellate Court that the matter of the present suit is a *res judicata* under s. 13 of that Code.

Accordingly we decree the appeal, and setting aside the lower appellate Court's decree remand the case to it for disposal of the appeal on the merits, and direct that the costs of this appeal shall follow the event.

*Cause remanded.*

1879  
May 29.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.*

HARDEO DAS AND ANOTHER (PLAINTIFFS) v. HUKAM SINGH  
(DEFENDANT).\*

*Act X of 1877 (Civil Procedure Code), s. 210—Decree payable by Instalments.*

*Held* that the provisions of s. 210 of Act X of 1877 are not applicable in a suit for the recovery of the amount of a bond-debt by the sale of the property hypothecated by such bond (1).

\* First Appeal, No. 17 of 1879, from a decree of Maulvi Muhammad Maqsood Ali Khan, Subordinate Judge of Agra, dated the 24th January 1879.

(1) See *Binda Prasad v. Madho Prasad*, I. L. R., 2 All., 129, where effect and Oldfield, J., a contrary opinion. Turner, J., expresses an opinion to this

In such a suit, therefore, the Court cannot direct that the amount of the decree shall be payable by instalments.

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THIS was a suit on a bond dated the 1st August 1872, whereby the payment of Rs. 12,000 within three years from that date together with interest at the rate of twelve per cent. per annum was secured. This bond charged certain immoveable property with the payment of the principal amount together with interest at twelve per cent. per annum. The plaintiffs claimed Rs. 21,200 on the bond, that is to say, the principal amount, Rs. 12,000, and interest on that amount at the rate of twelve per cent. per annum calculated from the 1st August 1872 to the 21st December 1878, when the suit was instituted, which interest amounted to Rs. 9,200; and they prayed that they might be allowed to recover the amount claimed by the sale of the hypothecated property. The defendants contended, *inter alia*, that the plaintiffs were not entitled to interest from the date the bond became due at the rate of twelve per cent. per annum, such rate being excessive, and they prayed the Court of first instance to direct that the amount of the decree should be paid by instalments. The Court of first instance gave the plaintiffs a decree for the principal amount claimed by them together with interest to the date of the decree at the rate of one per cent. per annum, directing that the amount of the decree should be paid by fifteen annual instalments, that the property should remain charged with the payment of the amount of the decree, and that should default be made in the payment of any instalment, or any risk arise of the decree-holder losing the security of the hypothecated property, the decree-holder should be entitled to enforce payment of the whole amount due under the decree.

The plaintiffs appealed to the High Court contending that the Court of first instance was not competent to make a decree for payment by instalments, and that it had improperly reduced the rate of interest fixed by the bond.

Babu *Dwarka Nath Mukerji*, for the appellants.

Munshi *Sukh Ram*, for the respondent.

The judgment of the Court was delivered by

PEARSON, J.—The appeal must, in our opinion, prevail. The lower Court has erred in applying the provisions of s. 210, Act X

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of 1877, to this suit, which is not a mere suit for money but asks for the recovery of the amount of a bond-debt by the sale of the property hypothecated in the bond. S. 210 was not intended to enable the Courts to set aside and override such a contract as that on the basis of which the present claim is laid. The security over the hypothecated property which it gave for the payment of the debt would be of little value, if it could be so set aside and overridden. The plaintiffs are entitled to an award against the defendants of the principal sum (Rs. 12,000), with interest at the rate of twelve per cent. per annum to date of decree, and to interest from the latter date to the date of realization at the rate of six per cent. per annum, and to their costs with interest thereon at the same rate; and to be empowered to recover the amount of the bond debt by the sale of the hypothecated property. The decree of the lower Courts is modified accordingly; and the costs of this appeal are allowed.

*Decree modified.*

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*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

BALL (DEFENDANT) v. STOWELL (PLAINTIFF).\*

*Instalment-Bond—Cause of Action—Act XV of 1877 (Limitation Act), sch. ii, arts. 66, 67, 75 and 80.*

B and S executed a bond, dated the 16th August 1874, in favour of plaintiff in consideration of a loan of Rs. 15,000, agreeing to repay the same within three years from the above date, and covenanting to pay every half-year interest on the same, at the rate of 8 per cent. per annum; and also to pay the premia on certain policies of insurance made over to plaintiff by way of collateral security. In the event of failure in payment on due date of interest and premia, the obligors made themselves liable to pay the full amount of the bond debt. The bond also contained the stipulation that it should be optional with the obligee to claim and, if necessary, to sue for the full amount of the bond on the failure of any one or more stipulated payment, or on the full expiry of the period of three years.

*Held* that the bond was not an instalment-bond, and therefore art. 75, sch. ii of Act XV of 1877, was inapplicable.

*Held*, by STUART, C.J., that limitation commenced after the expiration of the three years allowed by the bond for payment of the debt.

*Held*, by SPANKIE, J.—Art. 80, sch. ii of Act XV of 1877, applies to the suit, and limitation would run from the date when the bond became due;

\* First Appeal, No. 154 of 1878, from a decree of J. Alone, Esq., Subordinate Judge of Agra, dated the 22nd August 1878.

that, according to the stipulation in the bond, it would become due on failure in payment on date of both the interest and premia, and not on failure in payment of either of them only.

*Held*, further, that arts. 67 and 68, sch. ii of Act XV of 1877, were not applicable to the suit.

THIS was a suit for money due on a bond dated the 15th August 1874, the suit being instituted at Agra in the Court of the Subordinate Judge on the 16th July 1878. The terms of this bond were as follows:—"Know all men by these presents that we the undersigned, Edward Charles Ball and William DeRussett Stowell, having jointly and severally borrowed and received the sum of rupees fifteen thousand (Rs. 15,000) from Christopher William Stowell, at Agra, do hereby covenant and agree to pay or cause to be paid at Agra, unto the said Christopher William Stowell, or to his order, or to his heirs, executors, and assigns the said sum within three years from date hereof; interest on the same at the rate of 8 per cent. per annum being payable half-yearly, namely, on the 30th June and 31st December in each calendar year, and premia on life policies to be endorsed to the said Christopher William Stowell periodically, according to the rules of the Insurance Company.

"In the event of failure in the payment on due date of the interest and premia, and whether advice be or be not given of such defaults, we hereby jointly and severally render ourselves liable to pay up the full amount of this bond, or such portion or balance thereof as may be due or may become due according to the account of the said Christopher William Stowell, from date of such default to payment of loan in full and other charges that may or shall be incurred on account of the said loan.

"It shall be optional to the said Christopher William Stowell to claim and, if necessary, to sue for the full amount due on the bond, on the failure of any one or more stipulated payment, or on the full expiry of the period this bond was originally intended to run, if all its provisions had been fulfilled by us."

The defendant Ball alone defended the suit; his defence to the same being that it was barred by limitation, in the first place, with reference to art 75, sch. ii of Act XV of 1877, inasmuch as interest being payable half-yearly the bond was one payable by instalments, and default having been made in the payment of interest, the period

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of limitation ran from the time when the first default was made; and in the second place, if the bond was not one payable by instalments, inasmuch as the plaintiff's cause of action arose on the first default, then the period of limitation ran from the date of the default, notwithstanding the concluding words of the bond. The Subordinate Judge gave the plaintiff a decree holding that the bond was not one payable by instalments but a single bond, where a day was specified for payment, such day being the 15th August 1877, and that the suit was consequently one governed by art. 66, sch. ii of Act XV of 1877, and within time. Against this decree the defendant Ball appealed to the High Court.

Mr. *Hill* (Mr. *Howard* with him) for the appellant.—The sole question in this case is—when did the period of limitation begin to run? The difficulty lies in the “optional clause” at the conclusion of the bond, but apart from it, it is clear, on principle as well as authority, that the suit would be barred. The Subordinate Judge has chiefly discussed the question—Under what particular class of bonds does the instrument in suit fall? His finding is, that it is a bond of the description provided for by art. 66, *i.e.*, a single bond in which a day is specified for payment. In this, it is submitted, he is wrong. The money was repayable *within* three years, that is, at any time the obligors might select within three years. There is a material and well-recognised distinction between such a case and one in which the contract is that the money shall be repayable on the expiration of a given period. It cannot, therefore, be said, from this point of view, that the money was repayable on a specified day. But further, the parties stipulate that the money may become payable on the occurrence of an uncertain event, *viz.*, a default in the payment of interest and premia, which might happen on any of the half-yearly recurring dates on which such payments fell due. If then the bond be a single bond, and no day be specified for payment, art. 67 will apply, and the limitation period begin to run from the date of execution. It is, however, submitted that the bond is not a single bond, but a bond subject to a condition, and governed by art. 68, or if not that, that it is unprovided for by the Act, otherwise than by art. 80. It hardly, however, seems material to determine with strict accuracy under what particular article the bond falls, since the period in all cases of purely

money bonds is three years from the date when a right to sue for the whole sum secured first accrued. If this be so, and dealing with the question apart from the "optional clause," there can be little doubt in the matter. The Statute begins to run when the plaintiff might have first sued for the whole amount: *Darby and Bosanquet* on the Statutes of Limitation, p. 18; *Chitty on Contracts*, p. 750; *Hemp v. Garland* (1); *Hurronath Roy v. Maherullah Mullah* (2). There was, however, a suggestion in the lower Court that supposing a right of action did in fact accrue to the plaintiff on the first default in payment of interest, that right was waived, and the argument presumably was that then, by a series of tacit waivers, the vitality of the bond was preserved, as each default occurred, until the expiry of the full term of the bond. But it is submitted there was no waiver here. The conduct of the plaintiff relied upon to establish a waiver is, I presume, his forbearance to sue, for nothing else on his part has been proved or suggested, but this is not enough. There must be an overt act. Simply lying by and witnessing a forfeiture is not sufficient: *Keene v. Biscoe* (3); *Doe v. Allen* (4). The argument is apparently founded on analogies derived from the rule laid down in art. 75, sch. ii of the Limitation Act: that article, however, clearly shows that forbearance to sue, *per se*, does not amount to a waiver, for it is there provided that the right of suit arising out of a default shall co-exist with forbearance to sue until the right is altogether barred by the lapse of three years. Moreover, unless the effect contended for is expressly given to a waiver by the Act, it has not the effect of stopping the running of the limitation period: *Gumna Dambershet v. Bhiku Hariba* (5), where the authorities are collected. The general rule of law is that once the Statute has begun to run, nothing can stop it: Act XV of 1877, s. 9; *The East India Company v. Oditchurn Paul* (6). In the present case the lower Court has held that the bond falls under an article of the limitation Act which is silent as to waiver. If it be conceded that the Statute began to run when the plaintiff might first have sued for the full amount of the bond, and that there was no waiver, or, if there were, that it was ineffectual, it remains only to be considered whether the effect of the "optional clause" is to take the case out

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(1) 12 L. J. N. S. Q. B., 134.

(2) 7 W. R., Civ. R., 21.

(3) L. R., 8 Ch., 201.

(4) 3 Taunt., 78.

(5) I. L. R., 1 Bom., 125.

(6) 5 Moore's Ind. App., 43.



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of the Statute. It is submitted that it has no such effect; were it otherwise, it would involve the anomaly that a person might have two successive causes of action in respect of one and the same debt. The plaintiff here might have sued for the whole amount on the first default, but he could not do so unless he had then a cause of action for the whole amount. Mr. Addison, in his work on contracts, thus states the principle:—"It is a general rule that where there has once been a complete cause of action, the Statute begins to run, and that subsequent circumstances which would, but for the prior wrongful act or default, have constituted a cause of action, are disregarded." See also the judgment in *Hemp v. Garland* (1) and *Navalmal Gambhirmal v. Dhondhibabin Bhayantarav* (2), in the latter of which cases, Westropp, C.J., observes:—"There is, it is true, a proviso in the bond here that the obligee might waive the right to sue for the whole, and instead accept payment by instalments, but that proviso gave him nothing more than the right of waiver, which the law gave him, which right, as has been above observed, there is nothing here to show he exercised." In the present case all that the "optional clause" gives to the plaintiff is similarly a right to do that which he could by law do, namely, sue at the expiry of the term of the bond, if in the meantime he preserved his rights thereunder by waivers of his antecedent rights of action. It is hardly necessary to cite authority for the position that the parties to a contract cannot by agreement avoid the effect of the law of limitation: see, however, *The East India Company v. Oditchurn Paul* (3); *Krishna Kamal Singh v. Hira Sirdar* (4); *Stowell v. Billings* (5). Statutes of Limitation are in fact to be strictly applied: see the observation of the Privy Council in *Luchmee Buksh Roy v. Ranjit Ram Panday* (6). Interest beyond three years is not recoverable.

Mr. Conlan, with him the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.—The appellant's contention is deprived of any force it might otherwise have by the circumstance that no such breach as is contemplated by the forfeiture clause of the bond has occurred. A two-fold failure on the part of the obligors is there contemplated—a failure, that

(1) 12 L. J. N. S., Q. B., 134.

(2) 11 Bom. H. O. R., 155.

(3) 5 Moore's Ind. App., 43.

(4) 4 B. L. R. (F. B.), 101.

(5) I. L. R., 1 All., 350.

(6) 13 B. L. R., at p. 182.

is, in the payment of interest *and* premia, not of one without the other. Interest may not have been paid, but the premia on the life policies have been regularly paid. Therefore, no cause of action accrued to the obligee until the full original term of the bond expired. We contend that the bond comes under art. 66 of the schedule, and that three years have not elapsed from the day specified for payment. Time does not necessarily run from the date on which a cause of action accrues, but the periods given in the schedules are to govern, and these have been fixed by the Legislature without necessary reference to the date on which a cause of action accrued. For example, in a case of pre-emption, the cause of action arises on the date of the sale, but the period under the Act does not begin to run until the purchaser takes possession. We do not deny that parties cannot by agreement avoid the effect of the Statute, but we submit that it is competent to parties when entering into a contract of loan to determine the date on which the loan shall be repayable. Here the obligee is expressly empowered to sue on the expiry of the full term of the bond. The defendant, having voluntarily given the plaintiff the option of suing either on the happening of a default or on the expiry of the term of the bond, is estopped from pleading that his creditor cannot avail himself of the option.

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**Mr. Hill**, in reply.—The bond gives a right of action on the failure in payment of any *one* or more stipulated payment. A default in payment of interest is a default in payment of interest and premia, and would confer a right of action under this bond.

The following judgments were delivered by the Court :

**STUART, C.J.**—The decree of the lower Court in this case is clearly right, both in regard to the question of limitation and the joint liability of the defendants for the sum decreed. In the lengthened and anxious argument of the counsel for the appellant, numerous authorities in the English Courts, and also in the Courts in this country, were cited to show that the bond in this case was an instalment bond, and it is chiefly from a desire to examine these authorities that I have delayed my judgment. I have now carefully considered all the authorities, and find that they all assume and relate to the case of an undoubted instalment bond. In the present case, however, I am quite clear that the bond sued on

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is not an instalment bond, but a bond simply acknowledging the debt with interest payable half-yearly, with the proviso that if not so paid the obligors should be liable to pay up the whole amount from date of such default, that is, from date of failure in payment of interest. As to the limitation pleaded, the period clearly runs from the expiration of three years allowed by the bond for the payment of the debt, that is, from the 15th of August 1877, the date of the bond itself being the 15th of August 1874. Such appears to be the real nature and position of the bond, but it contains an allusion to policies of assurance, and premia thereon, as to which there is no contract apparent on the face of the bond itself, although there would appear from the evidence to have been an arrangement of the kind between the parties to fortify and further secure the bond debt. Be that as it may, we are only concerned with the decree made by the Subordinate Judge, and we affirm that decree with costs in both Courts.

SPANKIE, J.—The bond recites that the sum of Rs. 15,000 borrowed from C. W. Stowell, the plaintiff, respondent, obligee, is to be payable within three years from the date thereof (15th August 1874); that the interest is to be payable half-yearly, namely, on the 30th June and 31st December in each calendar year, that premia on life policies are to be endorsed to the said C. W. Stowell periodically according to the rules of the Insurance Company. The second clause recites that in the event of failure in the payment on due date of the interest and premia, and whether advice be or be not given of such default, the defendants, obligors, jointly and severally render themselves liable to pay up the full amount of the bond, or such portion or balance thereof as may be due, according to the account of C. W. Stowell, from date of such default to payment of loan in full and other charges that may or shall be incurred on account of the bond. In the third clause of the bond there is a condition that "it shall be optional to the said C. W. Stowell to claim, and if necessary to sue for the full amount due on the bond on the failure of any one or more stipulated payment, or on the full expiry of the period this bond was originally intended to run, if all its provisions had been fulfilled by us." There are two defendants, one, Mr. W. De Russett Stowell (son of C. W. Stowell, the obligee), unreservedly

admitted the justice of the claim. The other, E. C. Ball, acknowledged execution of the bond but pleaded limitation generally. His counsel, however, contended that art. 75, Act XV of 1877, applies to the bond, which is one payable by instalments, as interest the fruit of principal, was payable half-yearly; the plaintiff's cause of action arose when default occurred which gave him a right of suit, and from that time limitation would run; the proviso could not stop limitation from running; nor, if the bond is one payable by instalments, does the proviso amount to a subsequent waiver, and, therefore, it gives the plaintiff no further right than the law allowed him before it was written. The Subordinate Judge held that the bond contemplated in art. 75, sch. ii of the Limitation Act, is one in which the principal amount secured by the bond is made payable by instalments; that the bond in suit was not payable by instalments, but it was stipulated that the amount secured by the bond should be paid in a lump sum within three years from the date of the bond (15th August 1874); that the lump sum became due on the 15th August 1877, and, therefore, this suit instituted on the 16th July 1878 was within time. The Subordinate Judge also held that the stipulation to pay interest half-yearly, with the proviso that in the event of default in such payment the principal as well as the interest shall be payable at once, cannot convert the bond into one under art. 75. He further held that art. 68 would not apply to the bond, as there was no stipulation in it for any penalty; but the bond came under art. 66 which provides for a single bond or a bond without a penalty, and being of this character the suit was not barred by limitation. The Subordinate Judge, therefore, decreed in favour of plaintiff against both defendants. E. C. Ball, defendant, alone appeals from the decree, and his counsel insisted upon the pleas on which appellant's defence rested in the lower Court, citing various authorities to show that, as the bond was one payable by instalments, the cause of action accrued to the plaintiff on the occurrence of the first default, and that limitation began to run from that date, the plaintiff not being at liberty to fall back upon the proviso that it was optional to him to wait until the term of repayment fixed in the bond had expired; that there had been no waiver of the right to sue, and consequently the suit was barred. Further, it was contended that, even if there was not a bond payable

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by instalments, the right to sue accrued when the default provided for in the bond occurred, and, therefore, the suit was barred; that art. 66 did not apply to the deed, as no day of payment was specified in the bond, and, therefore, limitation ran from the date of execution, and again the suit was barred. It was also urged that art. 68, sch. ii, might apply, the bond being subject to a condition, but this point was not seriously pressed, it being contended that art. 80 applied, which refers to a suit on a bill of exchange, promissory note, or bond herein not expressly provided for, and the time from which limitation begins to run in such a suit is when the bill, note or bond becomes payable, and this suit should be barred, as the cause of action accrued on the first default. I propose first to deal with these contentions, and then dispose of the remaining objections in the memorandum of appeal to which I will subsequently refer.

I am not prepared to admit that the bond in suit is one payable by instalments. There was no contract between the parties that the sum borrowed should be paid off by instalments, that is to say, there was no agreement that the money borrowed and secured by the bond should be repaid in certain portions at different times. Interest may not be a part of a contract between the parties to it. If there is a condition in a bond that simple interest should be paid at a certain rate, then it is as much payable by virtue of the contract as the principal. It is a necessary incident to the original debt, but it is not a part of the original sum borrowed. It is the sum of money paid or allowed for the use of the money lent for a certain time at a fixed rate per cent. It is not added to the principal as a part of the original debt, but principal and interest in case of failure to pay make up the amount due under the bond. If I hold (as I do hold) that the bond in suit is not one payable by instalments, then art. 75, sch. ii, Act XV of 1877, does not apply to it. But I am quite willing to admit that if this article could be applied to it, then on the ruling of the authorities cited (1) this suit might be barred, assuming that the circumstances of this case are on all fours with those quoted, and that there had been no waiver. I was at first disposed to

(1) *Hemp v. Garland*, 12 L. J. N. S., Q. B., 134; *Karuppana Nayak v. Nallamma Nayak*, 1 Mad.

H. C. R., 209; *Návalmal Gambhir-mal v. Dhundibabin Bhagoantrao*, 11 Bom. H. C. R., 155.

apply art. 66 to the bond, accepting the conclusion of the Court below on this point. The bond at first sight appears to be a single bond, no penalty being attached to it, in which a day is specified for payment, and the time from which limitation begins to run is the day so specified. It is true that the day, the 15th August 1877, is not so specified in so many words. But the debt is to be paid within three years from the date of the bond: any one is entitled to tender payment of a debt of this nature within the time fixed for its repayment, and the bond in suit allows this to be done, but the time at which the debt must be repaid is specified in this case, and the last day would be the 15th August 1877. If this be so, the suit clearly is, unless otherwise barred, not beyond time, as it was instituted in 1878, and the period of limitation is three years from that date. If this view be correct, then art. 67 does not apply, as it cannot be said that the bond is one in which no day for repayment has been specified. Had the bond been silent in this respect the period of limitation would begin to run from the date of its execution, and art. 67 would have applied. I have, however, no doubt that art. 68 is not appropriate, as I do not find that the bond is subject to a condition. In the third section of the Limitation Act (XV of 1877) "bond" includes any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void, if a specified act is performed, or is not performed, as the case may be. Bearing in mind this interpretation of the word bond, and applying it to sch. ii of the Act, the instrument now before us does not contain any condition of the nature described in s. 3, and, therefore, it does not come under art. 68. But, as I have already stated, the learned counsel for the appellant did not press this point. But the learned counsel for the appellant has argued that art. 80, sch. ii of the Act applies, and, after full consideration of the point, I come to the conclusion that there is something more in the bond than meets art. 66. It is a single bond, and there is a day specified for payment, but there is also a liability for immediate demand of the entire amount due before the expiration of the term of the bond on the occasion of default of payment. This provision may, and, I think, does take the bond out of art. 66, and, in the absence of any provision for it in the schedule, places it under art. 80, and the limitation would run from the date when the bill, note, or bond became due. This brings us to the

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very serious contention as to the date when the cause of action accrued. Whether this be or be not a bond payable by instalments, it is urged that the right to sue accrued when the default occurred, and that limitation began to run from that date. The authorities cited to us and already referred to relate to bonds payable by instalments, but it is argued that the principle laid down in the Indian cases and in *Hemp v. Garland*(1) applies equally to any bond in which the right to sue is given on the occurrence of a default. It is laid down that if a plaintiff chose to wait till all the instalments became due, no doubt he might do so. But that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it. On the principle that every person is bound to sue when there is a complete present cause of action, the question in this case would be, when did the cause of action arise? When the defendant failed (if he did fail) to pay the interest on the first half-year and premia, or when the bond became payable on the 15th August 1877? The bond certainly recites that in the event of failure of the payment on due date of the interest and premia the defendants were liable to pay the full amount of the bond, or such portion or balance as might be found to be due according to plaintiff's account. But the third clause leaves it optional with plaintiff to claim his money at once, and if necessary to sue for the full amount due on the bond, on the failure of any one or more stipulated payment, or he might sue when the term of repayment fixed by the bond had fully expired. But it is contended on the further authorities cited(2) that "if to an action for the original cause of action the Statute of Limitations is pleaded, upon which issue is joined, proof being given that the action did clearly accrue more than six years before the commencement of the suit, the defendant, notwithstanding any agreement to inquire, is entitled to the verdict." In the Full Bench ruling of five Judges of the Presidency High Court(3), it was ruled by a majority of four Judges, one Judge alone dissenting, that no arrangement between parties could be recognised which enlarged the period of limitation allowed by law for the execution of decrees, and it was observed in that decision: "If a man having a

(1) 12 L. J. N. S., Q. B., 134.

(3) *Krishna Kamal Singh, v.*

(2) *The East India Company v. Hera Sirdar*, 4 B. L. R., F. R., Oditchurn Paul, 5 Moore's Ind. App., 43. 101.

'cause of action against another to recover immoveable property, or to recover money, or to recover damages for a trespass upon his land, or for an assault, should say, 'I will not sue you for twenty years,' he would not acquire a right to sue after the period of limitation fixed by law: if he does not intend to give up his right to sue at all he must take care not to bind himself beyond the time with which the Law of Limitation allows him to sue." This Court also recognised the force of this ruling in the case of *Stowell v. Billings* (1).

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It is true that by the terms of the contract between the parties an option is given to the plaintiff either to take his money at once on the occasion of default or to postpone his suit until the full term of the bond has expired, and the contract in this respect may be supposed to represent the true meaning of the parties and might not unreasonably be construed in favour of the plaintiff, who was at liberty to elect which of the two courses he would adopt. But the Act of Limitation would still control his choice. Mr. Justice Story has remarked on the Statute of Limitation that "it was intended to be a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demand after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of the witnesses." The Indian Law of Limitation certainly insists upon the peremptory strictness with which its provisions are to be enforced, and it fixes upon the Courts an obligation to dismiss all suits, appeals and applications made after the period of limitation as prescribed in sch. ii of the Act, although limitation has not been set up as a defence. The words, therefore, already cited from the Presidency Full Bench ruling (2), "If he does not intend to give up his right to sue at all, he must take care not to bind himself beyond the time within which the Law of Limitation allows him to sue," may be quite relevant to this case. For if it can be established that there was a default on which a right of action was given to the obligee to sue, there would be a good defence on the plea of limitation.

(1) I. L. R., 1 All., 350.

(2) *Krishna Kamal Singh v. Hira Sirdar*, 4 B. L. R., F. B., 101.



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It has been argued below by appellant's counsel that the third clause in the bond contemplates the occurrence of default of payment either of interest or premia as giving rise to an immediate cause of action, and that it is not necessary that the default should be in the payment both of interest and premia, although there had been default of this nature as a matter of fact: on the other hand, it is contended by respondent's counsel that the words in the third clause "any one or more stipulated payment" refer to the terms of the second clause "in the event of failure in the payment on due date of the interest and premia," and, therefore, there must be a default in the payment both of interest and premia, and that it is solely on condition of both these events happening that the obligors made themselves liable to an immediate demand of the entire sum due. It seems to me that the terms of the bond in the second and third clauses read together, and they must be so read in order to understand the real meaning of the parties, provide for the default both of interest and premia, and that in the event of default in the payment either of interest or premia only, and not of both, the obligee is not called upon to choose whether he will at once demand the amount due, or postpone his suit until the full term of the bond has expired. I therefore would hold that if the default does not extend beyond the interest or premia, a complete and present cause of action has not arisen. It is admitted that no interest has been paid on the bond, but it has not been established that there has been any default in respect of the premia. The bond is very carelessly or inaccurately expressed in words: "Interest on the same at the rate of 8 per cent. per annum being payable half-yearly, namely, on the 30th June and 31st December in each calendar year, and premia on life policies to be endorsed to the said Christopher William Stowell periodically, according to the rules of the Insurance Company." But owing to the form and position of the words used and to the punctuation, there is some ambiguity. It has been argued that the premia on life policies are, by the terms of the bond, to be endorsed to the obligee periodically, but this is not to my mind the meaning of the bond or the intention of the parties. The meaning doubtless is that the interest and premia are to be payable, the former half-yearly, on the dates named, the latter periodically, according to the rules of the

Insurance Company. This may be gathered from the succeeding clause which shows what is to be regarded as a default : "In the event of failure in the payment on due date of interest and premia." These are the words. The punctual payment of the premia is necessary to keep the policies alive. There was no necessity to endorse the receipts for premia. The life policies, in order to make the security more perfect, might be formally assigned to the obligee; but it was no part of the condition, the breach of which would give to the obligee the right of calling in his money at once. If the words "being payable" had been added to "premia," thus, "and premia being payable on life policies to be endorsed to the said Christopher William Stowell periodically, according to the rules of the Insurance office," there would have been no room for doubt as to what was meant. The life policies, though not endorsed to plaintiff, were nevertheless in his possession and were filed by him and are on the record of this case. There has been no default in the payment of the premia. The plaintiff has filed the evidence of the regular payment of the half-yearly renewal premia required by the Company's rules. There are on the record receipts for such premia on Stowell's life-policy, dated 13th May 1876, 13th November 1875, and 5th December 1876, respectively. There is a joint receipt to Messrs. Ball and Stowell of payment of the half-yearly renewal premia on Stowell's insurance due on the 10th day of May 1878. There are receipts for the payment of the half-yearly premia on the life of Ball, dated 13th May 1875, 13th November 1875, and 5th December 1876. These receipts show that there was no default in the payment of Stowell's premia up to the 10th May 1878, or of premia on Ball's life up to the 13th day of November 1876, consequently if there had been default after that date, and a cause of action had arisen, the suit would be within the period of limitation, assuming that the suit was one coming under art. 80, sch. ii of the Limitation Act. Besides these receipts there are Positive Promissory Notes for Rs. 166-10-8 each under the policies both of Ball and Stowell payable to bearer three months after sight, and the death of Ball and Stowell respectively, and redeemable three days after presentation at the office of the Positive Government Security Life Assurance Company, Limited, according to the rules of the Company, which were in the possession of plaintiff. Of all

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these receipts and notes one only was filed by the defendant Ball. The promissory notes payable on the death of Ball are dated 13th November 1874, 13th May 1875, 17th November 1875, 17th May 1876, 8th December 1876, and 18th June 1877. Those payable on the death of Stowell are dated 18th November 1874, 13th May 1875, 17th November 1875, 17th August 1876, 8th December 1876, 18th December 1877, and 12th June 1878. With this evidence before us which shows that there has been no default in the payment of premia, and entertaining the opinion that the default giving rise to a right of immediate demand for payment of the amount due on the bond before its expiration must be a default in respect of both interest and premia, I must come to the conclusion that there was no such default that gave to the plaintiff a complete and present cause of action. Therefore the contention that more than three years had elapsed from the date of default, and thereby the suit was barred, fails, the suit being within time, and the debt being acknowledged by one defendant and execution of the bond by the other, limitation alone being pleaded, the plaintiff would be entitled to a decree.

I have now considered all the points involved in the first to the fourth plea inclusive. There are two other pleas to be noticed, the fifth and sixth.

The fifth plea has no force, for if the interest had been barred by limitation, the suit must have been barred by the same limitation. The plea was not pressed before us, and I only notice it because it is on the memorandum of appeal. The sixth plea—that the Judge should have dismissed the suit with costs—is disposed of by this judgment.

I would dismiss the appeal, and affirm the decree of the lower Court, with costs.

*Appeal dismissed.*

## APPELLATE CRIMINAL.

1879  
July 17.

*Before Mr. Justice Spinkie.*

EMPRESS OF INDIA v. MURLL

*High Court, Powers of Revision—Act X of 1872 (Criminal Procedure Code), s. 297.*

*Held*, that great laxity in weighing and testing evidence is a material error in a judicial proceeding, within the meaning of s. 297 of Act X of 1872.

At a Sessions for jail delivery held at Agra on the 27th April 1875, seven prisoners, *viz.*, Harphal, Dipa, Bhawani, Dhan Singh, Bhima, Murli, and Jhentar were charged with the offence of dacoity. Jhentar was acquitted, and the first six were convicted and sentenced to transportation for life. Murli was sent to the Andaman Islands, to undergo the sentence of transportation for life. From there and through the Chief Commissioner of the Andaman and Nicobar Islands he forwarded his petition of appeal to the High Court in the month of May 1879, urging in his petition of appeal that, through want of friends and funds, he could not appeal before. The petition of appeal was received by the High Court, and was heard by Mr. Justice Spankie, by whom the appeals of the first five were heard and disposed of.

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The following was the judgment delivered by

SPANKIE, J.—The petitioner, convict No. 21013, Murli, is undergoing sentence of transportation for life in the penal settlement of Port Blair. He was convicted on the 27th April 1875 by Mr. H. G. Keene, the Sessions Judge of Agra, on a charge of dacoity, under s. 395 of the Indian Penal Code. Six other persons, Harphal, Dipa, Bhawani, Dhan Singh, Bhima, and Jhentar were tried at Agra with him. Jhentar was discharged by the Sessions Judge, and the others, including Murli, were transported for life. The five persons appealed to this Court, and on the 26th June 1875 were acquitted, and it was directed that they should be released. Murli did not appeal at the time, but does so now in a petition received through the Chief Commissioner of the Andaman and Nicobar Islands and Superintendent of Port Blair and Nicobars, that officer following the instructions conveyed to him in the letter of the Secretary to the Government, Home Department (1). Murli states that he was undergoing imprisonment for two years, on conviction of the offence of being in possession of stolen property, knowing the same to have been acquired by theft, when he was named by Pita, an informer, as having been one of the persons concerned in dacoity. He was put on his trial before the Sessions Judge of Agra, and convicted and sentenced to transportation for

(1) Mr. Officiating Secretary Bernard, C.S.I., dated 14th April 1879, to Superintendent of Port Blair and Nicobar Islands.

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life. Five persons appealed and were released. But he (Murli) was unable to represent his case at that time, having neither funds nor friends. Since his arrival in the penal settlement he has succeeded in obtaining a copy of the judgment of the Sessions Judge of Agra, and now appeals from the order passed by him. The prisoner ought to have appealed to this Court in sixty days from the date of the sentence, the 27th April 1875. The period of limitation has so long expired, and the explanation of the delay in appealing, though there may be some truth in it, is not altogether satisfactory, that I feel compelled to disallow the appeal. It is the case that all convicts have a right of appeal once, but that right is subject to the law of limitation, and I think that it would be unwise so to apply s. 5 of this law as to encourage the idea amongst the convicts of a penal settlement that they can at any time, as in this case, five years after the date of their conviction, appeal to this Court. At the same time, being well acquainted with the facts of the case, as I decided the appeal of the five other persons who had been transported for life, I am quite prepared to admit the petition as one for revision of the proceedings.

The case of Murli is on all fours with that of Harphal and others, and the same reasons which influenced my decision with respect to those appellants, lead me now to say that there is no satisfactory evidence to justify the conviction of Murli, and he ought to be released. My reasons will appear from the copy of my judgment in the case of Harphal and others which I have directed should be put up with this proceeding. I cannot at this time remember how it happened that I did not consider, as a Court of Revision, the case of the petitioner. I can only attribute my not having done so to the uncertainty that prevailed in this respect as to whether the Court was at liberty to interfere with the conviction of a prisoner who had not appealed (when dealing with the case of any person tried with him who had appealed), simply on a question of credibility of evidence. Later decisions both of this and of other Courts for years past have not tended to remove this uncertainty as to what is or is not a material error in a judicial proceeding. I am myself inclined, indeed I have acted in other cases in this view, to regard great laxity in weighing and testing evidence as a material error in a judicial proceeding.

and looking at the trial in this case, it would seem to me that there had been great indifference and laxity on the part of the Sessions Judge in this respect. Accepting, however, the judgment of this Court in Full Bench in the matter of *Hardeo* (1) I believe that I have the power of interfering now with the conviction of Murli. If we are not precluded by a judgment of acquittal from exercising the power of revision under s. 297 of Act X of 1872, we cannot be precluded from doing so, where there has been a conviction on evidence which has received no sifting, and which in many respects is so transparently false that, if it had been at all tested, its falsehood could not have escaped notice. And in this opinion I am fortified by the amended new Code of Criminal Procedure of 1879. It seems that the dubious character of s. 297, Act X of 1872, has now been fully admitted. S. 439 of the amended Code, if it stand in the Act when passed, provides that the High Court as one of Revision may exercise all the powers of an Appellate Court with regard to appeals from convictions. Being of the opinion that I have the power of revision in this case, in which opinion my honorable colleagues, to whom the papers have been circulated, acquiesce, I have no hesitation in saying that the conviction of Murli ought not to be maintained, but that he ought to be at once released. I therefore annul the conviction of Murli and the sentence passed upon him and direct his release.

*Conviction quashed.*

*Before Mr. Justice Oldfield.*

EMPRESS OF INDIA v. THOMPSON.

1879  
July 18.

*Adultery—Act XLV of 1860 (Penal Code), s. 497—Compounding of Offences—Act X of 1872 (Criminal Procedure Code), s. 188.*

*N* charged *T* with having committed adultery with his wife. On inquiry into the charge by the Magistrate, the case was committed to the Sessions Court for trial when *T* was convicted. *T* appealed to the High Court. After conviction *N* and his wife were reconciled, and *N* at the hearing of the appeal asked for leave to compound the offence. *Held*, that at that stage of the case sanction could not be given to withdraw the charge.

ONE Nuttall charged one Thompson with having committed adultery with his wife. The case was inquired into by the Magistrate

(1) I. L. B., 1 All., 139.

1879 and committed to the Sessions Court, by which the accused was  
 EMPRESS OF INDIA convicted and sentenced to one year's rigorous imprisonment. He  
 v. appealed to the High Court against the conviction and sentence.  
 THOMPSON. After the conviction the husband and wife had been living  
 together, and the husband at the hearing of the appeal asked  
 permission of the Court to be allowed to compound the offence.

Mr. *Leach*, for the prisoner.

The judgment of the Court, so far as it is necessary for the purposes of this report, was as follows :

OLDFIELD, J.—Since the conviction by the Sessions Judge the complainant has taken his wife back to live with him, and has asked this Court to be allowed to compound the offence, a sanction which cannot be given at this stage of the proceedings, but looking to the existing relations between the parties and the fact that the prisoner Thompson has been in custody since the 5th May, the Court is of opinion that the punishment already undergone will suffice, and his release is directed.

*Appeal allowed.*

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## FULL BENCH.

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1879  
 September 2.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie,  
 Mr. Justice Oldfield, and Mr. Justice Straight.*

EMPRESS OF INDIA v. MANGU AND OTHERS.

*Act X of 1872 (Criminal Procedure Code), ss. 272, 297—Arrest pending  
 Appeal.*

When an appeal has been preferred under s. 272 of Act X of 1872 the High Court may order the accused to be arrested pending the appeal.

ONE Mangu and six others had been tried on charges of culpable homicide not amounting to murder, and voluntarily causing grievous hurt, by the Sessions Judge of Sahāranpur and acquitted. The Local Government appealed to the High Court against the judgment of acquittal. After the admission of the appeal, the Junior Government Pleader applied for the arrest of the accused pending the appeal. The application was made to Straight, J., who referred the same to the Full Bench of the Court for disposal.

The *Junior Government Pleader* (Babu Drarka Nath Banarji), 1879  
 in support of his application, referred to *Queen v. Gobind Tewari* EMPRESS OF  
 (1). He further contended that the arrest sought for was only as a INDIA  
 means to compel the attendance of the persons accused before the v.  
 Court. The admission of the appeal revives the charge. MANGU.

The following judgments were delivered by the Full Bench:

STUART, C.J.—I concur in the opinion expressed by Mr. Justice Oldfield. I also agree with Mr. Justice Straight in holding that under s. 297 of the Criminal Procedure Code the re-arrest of the accused for the purpose of the appeal may be made.

SPANKIE, J.—On the point submitted to us, I accept the ruling in *Queen v. Gobind Tewari* (1), and approve the argument of the Legal Remembrancer in support of his contention that the Court had power to order the arrest of the accused. I observed at the hearing of argument in this case that if the contention quoted in the case referred to above could not be maintained, the High Court, under s. 297 of the Criminal Procedure Code, in any case coming to its knowledge, might, if it appeared that there had been a material error in any judicial proceeding of any Court subordinate to it, pass such judgment, sentence or order thereon, as it thought fit. It is not provided that the order passed should be final, and it might be one preliminary to a judgment in appeal. I do not, however, insist upon this view. I may observe that the draft Bill of the Criminal Code as amended—s. 427—expressly gives the power to the High Court to order the arrest of the accused person when an appeal is presented to it under s. 417, which corresponds with s. 272 of the current Code, except as to this power of arrest. The ruling, too, of the Calcutta Court referred to above (1) is cited as the marginal note to s. 427, and the proposed section is the same as para. 3 of s. 168 of Act IV of 1877, “The Presidency Magistrates Act,” by which the High Court may order the accused person to be arrested, committed to prison, or held to bail, when the public prosecutor appeals on behalf of the Local Government against an acquittal, dismissal, or discharge.

OLDFIELD, J.—I concur in the view taken by the learned Judges of the Calcutta High Court in *Queen v. Gobind Tewari* and others (1).

(1) I. L. R., 1 Cal., 281.



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The admission of an appeal revives the proceedings against the accused person who has been acquitted, and the Appellate Court, which has power, under s. 272 of the Criminal Procedure Code, to pass such judgment, sentence or order, as may be warranted by law, can, I apprehend, under the powers so conferred, compel the appearance of the accused person before it, and order his arrest.

STRAIGHT, J.—At the hearing of this reference I entertained some doubt as to the power of this Court, upon the admission of an appeal under s. 272 of the Criminal Procedure Code, to order the re-arrest of the person or persons who had been acquitted. I am not altogether clear upon this point now, despite the reasoning of the case (1) quoted by Mr. Justice Oldfield, but I may refrain from coming to any determinate opinion as to that, seeing that under the proposed new Code of Criminal Procedure such difficulty cannot recur. Moreover, I think, that under s. 297, it having come to the notice of this Court that the accused were improperly discharged, an order may be issued for their arrest. Let the Magistrate, therefore, arrest the accused, and keep them in custody till the appeal is disposed of.

*Application allowed.*

## APPELLATE CIVIL.

1879  
 July 8.

*Before Mr. Justice Oldfield and Mr. Justice Straight.*

THAMMAN SINGH (PLAINTIFF) v. GANGA RAM AND OTHERS  
 (DEFENDANTS).\*

*Decree—What it is to contain—Act X of 1877 (Civil Procedure Code), s. 206.*

The plaintiff sued on a bond in which real property was hypothecated. In his claim the property hypothecated was detailed, and the property itself was impleaded as a defendant, and he obtained a decree in the following terms: "Decree for plaintiff in favour of his claim and costs against defendant." *Held* that the decree was to be regarded as simply for money and not for enforcement of lien.

THIS was a suit by the plaintiff for possession of one biswa zemindari share in mauza Kaili, in pargana Badaun, by setting aside

\* Second Appeal, No. 115 of 1879, from a decree of Maulvi Zain-ul-ab-din, Subordinate Judge of Sháhjahánpur, dated the 14th November 1878, affirming a decree of Rai Raghu Nath Sahai, Munsif of Eastern Badaun, dated the 5th August 1878.

(1) I. L. R., 1 Calc., 381.

the auction-sale of the same in favour of the defendants. His claim was based on the following ground: That he had purchased the property in suit, and that after his purchase Ganga Ram, one of the defendants, caused the same to be sold by auction in execution of his decree against one Azim-ud-din, at which sale the other defendants, Ahmad Husain and others, purchased the same; that the decree in favour of Ganga Ram was a mere money-decree, and therefore the property was not liable to be sold in execution thereof, as previous to the sale it had passed to the plaintiff. The defendants, auction-purchasers, contended that the bond on which Ganga Ram obtained his decree was prior to the sale under which plaintiff claimed the property, and that in it the aforesaid zemindari share was hypothecated as security for the debt due on the bond; that, in his claim on the bond, Ganga Ram had detailed the property, and the property itself had been impleaded as defendant, and that the decree which was in the words following, "Decree for plaintiff in favour of his claim and costs against defendant," was both for the money and enforcement of lien.

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The Munsif, holding that as in the claim both the property and the person of the defendant were impleaded as defendants, and that as the decree passed was in his favour and against the defendants, the decree was therefore one for the enforcement of the lien and not a mere money-decree, dismissed the plaintiff's claim. On appeal, the Subordinate Judge, agreeing with the Munsif in his construction of the decree, dismissed the appeal. The plaintiff, thereupon, appealed to the High Court, contending that the decree did not give the plaintiff in that case the relief he sought, *viz.*, the enforcement of his lien against the property.

Munshi Sukh Ram, for the appellant.

Pandit Ajudhia Nath, Mir Zahur Husain, and Maulvi Obeidul Rahman, for the respondents.

The judgment of the Court was delivered by

STRAIGHT, J.—The simple point in this case is whether the decree obtained by the defendant Ganga Ram against his judgment-debtor is to be regarded as one for enforcement of lien or simply for money. It is true that, in the claim itself, the hypothecated property is detailed and the property itself is impleaded as a

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 v.  
 GANGA RAM. defendant, but the decree is quite silent about it and thus disposes of the suit: "Decree for plaintiff in favour of his claim, and costs against defendant." It was urged for the respondents, auction-purchasers, that a liberal construction should be placed upon the terms of the decree, and that it may reasonably be read as carrying relief against the property hypothecated. We think this argument should not be allowed to influence us and is inapplicable, where the Legislature has in the most specific terms directed how a decree should be shaped and what details it should contain.

- (i.)—The number of the suit.
- (ii.)—Names and description of parties.
- (iii.)—Particulars of the claim.
- (iv.)—*Shall specify clearly the relief granted or the determination of the suit.*
- (v.)—The amount of costs incurred in the suit, and by what parties and in what proportion they are to be paid.

It is admitted by the respondents that the decree in this case is vague and defective; but they urge that read by the light of the claim, its intention is obvious, and that it may fairly be interpreted as being one for the enforcement of lien. There are certain broad rules by which construction of Acts is guided, that are perfectly well known and recognised, but it does not appear to us that they could be applied here, nor do we think that we have any right to treat this as a question of construction at all. The s. 206 of Act X of 1877 has, in the details already set out, laid down in the most explicit way, what the contents of a decree are to be: "Shall specify clearly the relief granted," and if there be an omission in the decree so that the relief given by it does not in terms go to the extent asked, we do not think it is part of the duty of this Court, or, indeed, of any other, to import words for the purpose of stretching its operation. The Court making the decree must be presumed to have expressed the relief it was prepared to give, and the words "Decree for plaintiff in favour of his claim and costs against defendant" have, in our judgment, nothing about them specifying clearly, as required by the Act, any relief in the shape of enforcement of lien against property

hypothecated. The argument for elasticity in construction of the terms of a decree urged by the respondent would, if admitted, be productive of the greatest confusion and inconvenience, and involve a continued conflict of decisions. We must take the decrees as we find them, and not embark into speculation as to what was the intention of the Court passing the decree. Under these circumstances we decree the appeal and plaintiff's claim with costs.

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*Appeal allowed.**Before Mr. Justice Spankie and Mr. Justice Straight.*

HARSUKH (DEFENDANT) v. MEGHRAJ (PLAINTIFF).\*

1879

July 8.

*Decree—What is to contain—Act VIII of 1859 (Civil Procedure Code), s. 189—Act X of 1877 (Civil Procedure Code), s. 206.*

Where the plaintiff by his claim sought for a decree for money and enforcement of lien on the property hypothecated in the bond on which the claim was based, and he obtained a decree for the "claim as brought" without any specification in it as to the relief he sought by charging the property hypothecated, *held* that such a decree was a decree for money only, and did not enforce the charge on the property.

*Muluk Fuqueer Bakhsh v. Manohur Das* (1) followed.

THIS was an appeal from the decision of the Judge of Meerut reversing the decree of the Subordinate Judge of the district. The facts of the case and the grounds of contention before the High Court appear sufficiently from the following judgments of the Court.

*Babu Jogindro Nath Chaudhri*, for the appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*) and *Babu Oprokash Chandar Mukarji*, for the respondent.

The following judgments were delivered by the Court:—

SPANKIE, J.—In this case the facts were admitted. The only question for decision is, whether the original decree obtained by appellant charged the property in suit for the satisfaction of the amount decreed.

The Subordinate Judge held that the property was so charged. The suit was one to enforce a lien. The judgment declared the

\* Second Appeal, No. 146 of 1879, from a decree of R. M. King, Esq., Officiating Judge of Meerut, dated the 12th November 1878, reversing a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 11th July 1878.

(1) H. C. R., N.-W. P., 1870, p. 29.

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lien good and valid. The claim was decreed as brought. The Subordinate Judge allows that the decree was not properly prepared, but there can be no question as to what was granted by the decree. It was not a part but the whole of the claim which was decreed, and this included the enforcement of the lien against the property. The Subordinate Judge did not consider the precedent *Muluk Fuqueer Bakhsh v. Lala Manohur Das* (1), which was brought to his notice, to be applicable to the case. In appeal the Judge held that the words "decreed virtually" do not amount to a specific decree that the plaintiff may recover the amount of his claim by the sale of the property hypothecated. He therefore decreed the appeal and reversed the decision of the Subordinate Judge.

The defendant, appellant, relies upon the decision of the first Court.

The wording of the sections bearing upon decrees is the same both in Act VIII of 1859, and Act X of 1877, as regards the points which relate to the case before us. The particulars of the claim are stated in the body of the decree, the subject of dispute, but "the relief granted" is not specified clearly. The claim is "decreed virtually" is not a clear specification of the relief granted. In this respect I have no hesitation in agreeing with the Judge. The Subordinate Judge does not consider that the case cited (1) is applicable to the present case. But in the case the plaintiff in a former suit had not confined himself to asking for relief in the shape of what is called a mere money-decree, he sought also to enforce his charge against the land. The decree which was passed *ex parte*, after reciting the substance of his plaint, was clearly confined to giving him a decree for the money against the person. The Court (Morgan, C.J., and Ross, J.) held that they were bound to give effect to the decree according to the plain meaning of the language used, and this clearly gave relief merely against the person for the debt. The Court added: "If the plaintiff, from negligence or other cause, omitted to prefer the portion of his claim which sought to charge the land, or, having preferred it, was content to accept an imperfect adjudication, or one which awarded him only a part of the relief claimed, he cannot now bring forward

(1) H. C. R., N.-W. P., 1870, p. 29.

in a fresh suit matter which might well have been disposed of. The decree made was not questioned either in appeal or by review."

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The principle upon which the ruling proceeds appears to be very applicable to this case, and to the decree in which the particulars of the claim are stated, and the suit was one in which the plaintiff certainly desired to enforce his lien against the hypothecated property, but the decree is silent in respect to this particular relief. It states that the claim is virtually decreed against the defendant. There is no addition of the words by sale of the property hypothecated in the bond. The decree therefore was imperfect and did not give the relief asked for, and the plaintiff should have got it amended, or have applied for a review, or should have appealed against the decree in order to have it brought into agreement with the judgment.

A majority of the Court in Regular Appeal, No. 75 of 1873, decided by the Full Bench on the 30th June 1876 (1), held upon a reference to the Court at large that, in a case decided in accordance with a confession of judgment, in which the following words appear, "The whole of the property as entered in the deed will remain hypothecated and mortgaged till payment of the entire demand," but in which the operative part of the decree was one "for the amount claimed with costs and interest against the defendants, who have promised to pay the amount within two years, on their confession of judgment admitted by the plaintiff," the decree was merely a money-decree. One of the learned Judges who formed the majority observed: "It seems to me impossible to hold that it is more than a mere money-decree: the relief granted is money only, nor is it provided that the money may be realised by the sale of any particular property, by reason of its hypothecation for the purpose. No doubt it appears that the decree was passed in accordance with a confession of judgment, and does not include all the purport thereof. There is reason to believe that it was imperfectly drawn out, and that its imperfection is detrimental to the decree-holder. It was competent to him to have applied for its correction, but it is not competent to us to rule that it is other than a mere money-decree, in the terms in which it has been drawn."

(1) Unreported.

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MEGHRAJ.

We are, I think, bound to follow the opinion of the majority of the Full Bench in 1876 (1). A judgment, however, of a Division Bench of this Court in *Azim-ul-lah Khan v. Kishen Lal* (2) was shown to us in which the learned Judges took a different view, and one of them seems to have changed his opinion. In that case, according to the memorandum of appeal, the decree in words was to the effect that "the claim be decreed with costs and interest," and the Subordinate Judge held that in the decree there was no order respecting the enforcement of the lien, nor is there an order that the money would be realised by an auction-sale of the property. There was no order in the decree referring even in the most distant manner to the hypothecated property. The Subordinate Judge admitted that this might have been carelessness in preparing the decree, but considered that the decree-holder should have had it amended. In appeal the learned Judges held that the first Court "had rightly construed the decree to be not merely a money-decree, but a decree also for the enforcement of the lien, and the claim was for the recovery of the bond-debt, by the enforcement of the lien."

This decision is quite opposed to the opinion of the majority of the Court in 1876 (1) and it may have been that the Subordinate Judge misapprehended what the decree did recite. The Munsif, however, admitted in his judgment that the word "*kifalat*" (pledge) had been omitted in the decretal order owing to an error on the part of the decree clerk. The former decisions refer to the time when Act VIII of 1859, was in force, but under the current Act X of 1877, the wording of s. 206 is still more stringent; now it says that the "decree must agree with the judgment," words not found in the corresponding section of Act VIII of 1859, and the section further provides means for the amendment of a decree, if it is found to be at variance with the judgment, so as to bring it into conformity with the judgment. Appeals also are admissible under the new Act not only from decisions but from any part of them, so that every facility is offered for the correction of decrees. This being so, I think that we should not in any way show tenderness to any indifference on the part of a decree-holder, who consents to take a decree loosely drawn out, or which grants him incomplete relief, and in doing so is

(1) R. A. No. 75 of 1873, decided on the 30th June 1876—unreported.

(2) S. A. No. 155 of 1877, decided on the 19th December 1878—unreported.

not in accordance with the judgment. It is not for us to construe the relief granted by the decree, by reference to the particulars of the claim. These are required to be set forth in the decree, but it is also obligatory to set out clearly the relief granted or other determination of the suit. The decree which gave rise to the present suit does not fulfil these conditions, and as it is expressed, it is in my opinion nothing more than a money-decree against the defendant. I would therefore dismiss the appeal and affirm the judgment with costs.

1879

HARSUKH  
v.  
MEGHRAJ.

STRAIGHT, J.—I entirely agree in the views of Mr. Justice Spankie, which are in accordance with the opinion I entertained in a case of a similar kind (1), involving like considerations, before Mr. Justice Oldfield and myself.

*Appeal dismissed.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Straight.*

EMPRESS OF INDIA v. BANNI.

1879

*August 4.*

*Exposure of child—Culpable homicide—Act XLV of 1860 (Indian Penal Code), ss. 304, 317.*

Where a mother abandoned her child, with the intention of wholly abandoning it, and knowing that such abandonment was likely to cause its death, and the child died in consequence of the abandonment, *held* that she could not be convicted and punished under s. 304 and also under s. 317 of the Indian Penal Code, but under s. 304 only.

ONE Banni exposed her infant child, which was in her sole care, in a certain place, with the intention of wholly abandoning it, and knowing that her act was likely to cause its death. The child died in consequence of the exposure. Banni was convicted by Mr. W. Tyrrell, Sessions Judge of Bareilly, on the 18th June 1879, of an offence punishable under s. 317 of the Indian Penal Code, and also of an offence punishable under s. 304 of that Code, and was sentenced for the first-mentioned offence to rigorous imprisonment for two years, and for the last-mentioned offence to rigorous

(1) *Thamman Singh v. Ganga Ram*, ante p. 342.



1879 <hr/> EMPRESS OF INDIA v. BANNI.	imprisonment for the same period, such last sentence to take effect on the expiry of the sentence under s. 317. She appealed to the High Court.
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The appellant was not represented.

STRAIGHT, J.—In disposing of this appeal, it is necessary I should correct a mistake of procedure into which, according to my judgment, the Sessions Judge has fallen, by making two convictions of the appellant for offences against ss. 304 and 317 of the Indian Penal Code, and passing sentence for each. As long as the child remained alive the charge under s. 317 of “exposure with intent to abandon” could have been properly sustained, and had Musammat Banni been tried before its death for this offence, she could rightly have been convicted, and as provided by the explanation at the end of s. 317 such conviction would have been no bar in the event of the child’s death to a prosecution for culpable homicide. To give an analogous case, *A* commits an assault upon *B* and undergoes his trial for an assault before *B*’s death, which ultimately takes place in consequence of the injuries inflicted by *A*. *A*’s conviction for the assault is no bar to an indictment for manslaughter. But if before *A*’s trial *B* dies, then *A* must be tried for manslaughter, the lesser crime having merged into the greater, and the offence committed relating to one and the same transaction. In the present case when the child died the offence of Musammat Banni, under s. 317, became absorbed in the more serious charge of culpable homicide, and the unlawful act of exposure having directly caused the death, and being done with the knowledge it was likely to cause death, brought the accused within the operation of s. 304. It seems to me that the maxim “*nemo debet bis puniri pro uno delicto*” applies, and that in this case two separate sentences can no more be passed than they could for murder and wounding with intent to murder, where the death of the party attacked had taken place, and the death and the wounding involved one and the same transaction. The criminal exposure under s. 317 was the direct cause of the death of the child, and therefore the crime, instead of stopping at s. 317, death being caused, took the more serious shape under s. 304. It was, of course, perfectly proper to frame a charge upon s. 317, because had any question arisen about the cause of death being the

exposure, the transaction would have resumed its character under s. 317. For the preceding reasons I therefore think it safer to quash the conviction and sentence upon s. 317, but agreeing as I do in the view taken as to the proper punishment for the conduct of the accused by the experienced Sessions Judge, I order that so far as the appeal against the conviction on s. 304 is concerned it be dismissed, and that the sentence in respect of the conviction on that section be increased to one of four years rigorous imprisonment.

1879  
 EMPRESS OF  
 INDIA  
 v.  
 BANNI.

## CRIMINAL JURISDICTION.

*Before Mr. Justice Straight.*

EMPRESS OF INDIA v. RAGHUBAR AND OTHERS.

1879  
 August 9.

*Act X of 1872 (Criminal Procedure Code), s. 489—Security for keeping the peace—Act XLV of 1860 (Penal Code), ss. 503, 506—Criminal intimidation.*

The words in s. 489 of the Criminal Procedure Code, "taking other unlawful measures with the evident intention of committing a breach of the peace," do not include the offence of intimidation by threatening to bring false charges.

Where, therefore, a person was convicted under ss. 503 and 506 of the Indian Penal Code of such offence, *held* that the Magistrate by whom such person was convicted could not, under s. 489 of the Criminal Procedure Code, require him to give a personal recognizance for keeping the peace.

THIS was a case referred to the High Court for orders under s. 296 of Act X of 1872 by Mr. R. G. Currie, Sessions Judge of Gorakhpur.

STRAIGHT, J.—The point here is whether upon a conviction under ss. 503 and 506 of the Penal Code, the accused person can be called upon, under s. 489 of the Criminal Procedure Code, to find recognizances with or without sureties to keep the peace. The defendants in the present case were convicted by the Magistrate of intimidating the complainant by threatening to bring false charges against him, and the question seems to be whether the words "taking other unlawful measures with the evident intention of committing a breach of the peace" can be said to include an offence of this kind. I do not think that the operation of s. 489 is limited to riot, assault, actual breach of the peace, or abetting the same, or unlawful assembly, but that it is intended to comprehend a wider range of offences, and it must be for the Magistrate or Court to decide in each case whether, from the nature of the charge upon

1879  
 EMPRESS OF  
 INDIA  
 v.  
 RAGHUBAR. which conviction takes place, there has been direct force or violence to the person, or conduct inducing an apprehension of force or violence, or a direct threat of force or violence, or a provocation to the commission of force or violence. Intimidation, for example, as in the present case, may have none of these elements about it. The threats used here are "to make charges" against the complainant, and involve no suggestion of personal physical injury, but one can readily understand the possibility of a case of intimidation arising in which there might be the strongest indication of an evident intention to commit a breach of the peace. As far as I have been able to ascertain there are only three cases bearing upon the point, two of these decided by the Calcutta High Court (1) upholding the taking of recognizances on conviction for criminal trespass, and a decision of the Full Bench of this Court in the matter of *Chamru*, decided 8th December 1876 (2). These bear out the view I have expressed, and though I think in the present instance that the Magistrate was wrong in requiring recognizances, because there is nothing about the conduct of the accused threatening the peace, the mistake he has fallen into is perfectly excusable. The recognizances of the defendants must therefore be discharged.

## APPELLATE CIVIL.

1879  
 August 11.

*Before Mr. Justice Spankie and Mr. Justice Straight.*

GOPAL SING (AUCTION-PURCHASER) v. DULAR KUAR (JUDGMENT-DEBTOR)\*.

*Execution of Decree—Application to set aside sale of immoveable property—Auction-purchaser—Appeal—Act X of 1877 (Civil Procedure Code), ss. 32, 311, 312, 588 (m), 647.*

Where after a judgment-debtor has applied, under s. 311 of Act X of 1877, to have a sale set aside, the auction-purchaser is made a party to the proceedings, and the sale is set aside, the auction-purchaser can appeal against the order setting aside the sale. *Kantki Ram v. Bankoy Lal* (3) followed.

THE judgment-debtor in this case applied to the Court executing the decree under the provisions of s. 319 of Act X of 1877 to

\* First Appeal, No. 47 of 1879, from an order of Babu Aubinash Chandar Banarji, Officiating Subordinate Judge of Farukhabad, dated the 12th March 1879.

(1) 7 W. R. Cr. 14, and 20 W. R. Cr. 37.

(2) Unreported. See two other cases, *Queen v. Bachu*, H. C. R.,

N.-W. P., 1875, p. 328, and *Queen v. Kunhiya*, H. C. R., N.-W. P., 1872, p. 154

(3) Unreported.

set aside the sale of certain immoveable property. This application was opposed by the auction-purchaser. The Court allowed the application and set aside the sale, on the ground of a material irregularity in its publication which had substantially injured the judgment-debtor.

1879

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 GOPAL  
SINGH  
v.  
DULAR  
KUAR.

The auction-purchaser appealed to the High Court, contending that there had been no irregularity in publishing the sale, or if there had been any it was not a material one, nor had the judgment-debtor been injured by reason of it, and the sale should therefore not have been set aside.

The *Senior Government Pleader (Lala Juala Prasad)* and *Munshi Hanuman Prasad*, for the appellant.

*Mr. Leach* and *Pandit Bishambhar Nath*, for the respondent.

The following judgments were delivered by the Court :—

SPANKIE, J.—There was some preliminary argument, though the objection cannot be said to have been distinctly raised by respondent's pleader, as to whether the auction-purchaser was in a position to appeal. By s. 311 of Act X of 1877 the decree-holder or any person whose immoveable property has been sold may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting the sale. In this case the judgment-debtor objected, and notice was served upon the decree-holder and the auction-purchaser. Upon the judgment-debtor's objection the sale was set aside. An appeal against the order setting aside the sale is admissible under letter (m), s. 538 of the Civil Procedure Code. The auction-purchaser appeals. It is true that the auction-purchaser as such cannot apply under s. 311 to set aside a sale on the ground of irregularity. That application is confined to the decree-holder and the person whose immoveable property has been sold. But if the auction-purchaser has been made a party to the proceedings under ss 32 and 647 of the Code, and if he has appeared on service of notice and has shown cause why the sale should not be set aside, then if the order be against him, I see no bar to his availing himself of the appeal allowed by law. I would say that the appeal is admissible, and in this view I follow a ruling to which I was a party in the case of *Kanthi Ram v. Bankey Lal* (1) decided on the 11th June 1879. If, however,

(1) Unreported.

1879

GOPAL  
SINGH  
v.  
DULAR  
KUAR.

my hon'ble colleague has a doubt upon this point, I am willing that it should be referred for the consideration of the Court at large. On the merits this appeal should be decreed. (The learned Judge then proceeded to determine the appeal.)

STRAIGHT, J.—I am glad to have had an opportunity of carefully looking at the several sections of Act X of 1877 relating to the setting aside of sales in execution of decree, and to the title of the parties who may be heard upon the applications of that kind. In the present case the appellant is to be found in the person of the auction-purchaser, and although in ss. 311 and 312 he is not specifically referred to as one of the persons who may go to the Court for relief, yet in the proceedings in the execution department he was made a defendant under s. 32, I presume upon the ground that his presence was necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved, so that he became to all intents and purposes a party to the proceedings, and as such I think entitled to all the rights that there were in the litigation either in the judgment-debtor or the decree-holder. Consequently, as they would both of them have a right of appeal against an order setting aside or confirming a sale under s. 588, I think that the auction-purchaser, having been made a party to the proceedings, may as in the present case lodge an appeal. Therefore agreeing with the views of Mr. Justice Spankie in this matter, and with those expressed by him and Mr. Justice Oldfield in a case decided by them on the 11th June 1879 of *Kanthi Ram v. Bankey Lal* (1), I see no reason for referring the point as to the right of appeal of an auction-purchaser to the Full Bench. (The learned Judge then proceeded to determine the appeal.)

1879

August 12.

*Before Mr. Justice Spankie and Mr. Justice Straight.*

BHAWANI KUAR AND ANOTHER (PLAINTIFFS) v. BIKHI RAM AND ANOTHER (DEFENDANTS).\*

*Suit for damages—Suit for money received to plaintiff's use—Act XV of 1872 (Limitation Act), sch. ii, art. 62.*

The holder of a decree for money which had been sold in the execution of a decree against him sued the auction-purchaser, the sale having been set aside,

\* Second Appeal, No. 414 of 1879, from a decree of C. W. Moore, Esq., Officiating Judge of Aligarh, dated the 14th March 1879, reversing a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 21st September 1878.

(1) Unreported.

for the money he had recovered under the decree. *Held* that the suit was not one for damages but for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, to which the period of limitation applicable was three years.

1879

BHAWANI  
KUMAR  
v.  
RIKHI RAM.

THE plaintiffs in this suit had obtained a decree for money against one Madho Singh and certain other persons on the 23rd August 1875. One Gulab and a certain other person caused this decree to be sold in the execution of a decree held by them against the plaintiffs, on the 11th April 1876, when the defendants in this suit purchased it. On the 7th June 1876 the defendants recovered Rs. 1,796-10-0 under the decree. On the 22nd August 1877 the sale of the decree was set aside by the Appellate Court. The plaintiffs now sued the defendants for the sum recovered by them under the decree together with interest thereon, the suit being instituted on the 23rd August 1878. The defendants set up as a defence to the suit that it was barred by limitation. The Court of first instance disallowed this defence. On appeal by the defendants the lower appellate Court held, having regard to the case of *Debi Das v. Nur Ahmad* (1), that the suit was one for damages, to which the period of limitation applicable was one year, and such period running from the date the defendants received the money claimed, the suit was barred by limitation.

The plaintiffs appealed to the High Court.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the appellants.

Mr. *Conlan* and Babu *Jogindro Nath Chaudhri*, for the respondents.

The judgment of the Court was delivered by

SPANKIE, J.—We are of opinion that the decision of the Judge is erroneous. The suit is not one for damages, but, under the circumstances, rather one for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. The later decisions of this Court, and notably the one marginally noted (2), take this view of the law. The limitation would be three years. We reverse the decision of the lower appellate Court, and remand the appeal for re-trial on the merits; costs will abide the result.

*Cause remanded.*

(1) H. C. R., N.-W. P., 1875, p. 174.

(2) *Ram Kishen v. Bhawani Das*, I. L. R., 1 All., 333.

1879  
August 13.

## FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Turner,  
Mr. Justice Spankie, and Mr. Justice Oldfield.*

DARBO (PLAINTIFF) v. KESHO RAI (DEFENDANT).\*

*Act VIII of 1859 (Civil Procedure Code), s. 7.*

*D*, being able to sue for the possession of certain property, omitted to do so, and sued in the first instance only for a declaration of her right to such property. The Court refusing to make any such declaration on the ground that she could sue for possession, *D* then sued for possession. Held that the second suit was not barred by s. 7 of Act VIII of 1859 (1).

THE plaintiff in this suit had, on her husband's death, sued one Kesho Rai for a declaration of her title to succeed as her husband's heir to certain property, and for a declaration that the defendant was not the adopted son of her deceased husband. The Court of first instance dismissed this suit on the ground that the plaintiff was not in possession of a large portion of the property, and should therefore have sued for possession. On appeal by the plaintiff the High Court, on the 23rd July 1874, held that the plaintiff was entitled for the protection of the property in her possession to a decree that the defendant was not the adopted son of her deceased husband, and in respect of the property of which she was not in possession referred her to a suit for possession. The plaintiff subsequently brought the present suit against Kesho Rai for the possession of this latter property. The Court of first instance held that the claim was barred under the provisions of s. 7 of Act VIII of 1859.

The plaintiff appealed to the High Court contending that the claim was not barred under the provisions of s. 7 of Act VIII of 1859.

The Court (STUART, C.J., and OLDFIELD, J.) referred to the Full Bench the question whether the suit was or was not so barred.

Mr. Chatterji, Pandit Ajudhia Nath, and Babu Oprokash Chandar Mukarji, for the appellant.

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\* Regular Appeal, No. 96 of 1875, from a decree of Rae Shankar Das, Subordinate Judge of Saharanpur, dated the 6th August 1875.

(1) See also *Tulsi Ram v. Ganga Ram*, I. L. R., 1 All., 253.

Mr. Conlan, Pandit Bishambhar Nath, and Munshi Hanuman Prasad, for the respondent. 1879

The judgment of the Full Bench, so far as it related to this question, was as follows: DARBO  
v.  
KESHO RAI.

JUDGMENT.—In so far as the appellant now claims possession of property to which she formerly claimed a declaration of title, we are of opinion that the suit is clearly not barred; she is seeking a different relief, and the relief she formerly sought was refused her in respect of this property, on the ground that the Court ought not to exercise its discretionary power of awarding a declaration of title when relief can be obtained by an ordinary suit for possession.

### APPELLATE CIVIL.

*Before Mr. Justice Spankie and Mr. Justice Straight.*

ABDUL SAMAD AND ANOTHER (PLAINTIFFS) v. RAJINDRO KISHOR SINGH (DEFENDANT).\*

1879  
August 15.

*Return of Plaintiff—Appeal—Act X of 1877 (Civil Procedure Code), ss. 57 (c), and 588 (e)—Act XII of 1879, s. 2.*

Although s. 57 of Act X of 1877 contemplates the return of the plaint, should error be patent, when it is first presented, yet there is nothing in the wording of that section which forbids the return of the plaint at a later stage in the suit.

Where, therefore, after the issues in a suit were framed, the Court decided that it had no jurisdiction and returned the plaint to be presented in the proper Court, *held* that in so doing the Court acted under s. 57 of Act X of 1877, and its decision, not coming within the definition of a “decree” in s. 2 of Act XII of 1879, was not appealable as such, but was appealable under s. 588 of Act X of 1877 as an order.

THE facts of this case, so far as they are material for the purposes of this report, were as follows: The Court of first instance held on an issue which it added of itself at the hearing of the case, after the issues had been framed by a former Subordinate Judge, that it was not competent to try the suit, inasmuch as the cause of action did not arise, neither did the defendant reside within the local limits of its jurisdiction. The decision of the Court ended in these terms: “The plaintiff’s suit is therefore dismissed: the plaint is to be returned to the plaintiffs.”

\*First Appeal, No. 91 of 1879, from an order of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 27th June 1879.



1879

ABDUL  
SAMAD  
v.  
RAJINDRO  
KISHOR  
SINGH.

The plaintiffs appealed to the High Court "from the order" of the Court of first instance. It was objected on behalf of the respondent that, as the suit had been dismissed, the appeal should have been preferred as an appeal from a decree.

The *Senior Government Pleader* (Lala Juala Prasad) and Munshi Hanuman Prasad, for the appellants.

Mr. Conlan and Pandit Bishambhar Nath, for the respondent.

The judgment of the High Court, so far as it related to the above contention, was as follows :

SPANKIE, J.—A preliminary objection was taken that the Subordinate Judge had dismissed the suit, and that there should have been an appeal as from a decree in an original suit, whereas the present appeal had been entered as a first appeal from an order. The Subordinate Judge has certainly made use of the words "dismiss," but it is clear from his direction that the plaint was to be given back, that he stopped and intended to stop from further hearing of the suit, when he discovered that he had no jurisdiction. He, therefore, when he returned the plaint to be presented in the proper Court, was acting under s. 57, cl. (c), Act X of 1877. It may be that the section contemplates a return of the plaint, should error be patent, when it is first presented, but there is nothing in the wording of the section which forbids the return of the plaint at a later stage in the case, and it has been so held in former cases. An order returning a plaint under s. 57 of the Act is appealable under s. 588 of the Code, and it does not come within the definition of the decree in the amended Act, which appears to have come into force on the 29th July last. We see no reason to doubt that the appeal has been properly instituted as a first appeal from an order.

1879

August 21.

*Before Mr. Justice Spankie and Mr. Justice Straight.*

KIRATH CHAND AND OTHERS (DEFENDANTS) v. GANESH PRASAD (PLAINTIFF).\*

*Suit for "haqq-i-chakaram" based on custom—Act XV of 1877 (Limitation Act), sch. ii, arts. 62, 120, 132.*

C, the proprietor of a certain "mohalla," sued K, who had purchased a house situated in the mohalla at a sale in the execution of his own decree, for one-fourth of the purchase-money, founding his claim upon an ancient

\* Second appeal, No. 196 of 1879, from a decree of C. Daniell, Esq., Judge of Gorakhpur, dated the 22nd November 1878, affirming a decree of Maulvi Ahmad-ullah, Munsif of Gorakhpur, dated the 21st September 1878.

custom obtaining in the mohalla, under which the proprietor thereof received one-fourth of the purchase-money of a house situated therein, whether sold privately or in the execution of a decree. *Held* that the period of limitation applicable to such a suit was that prescribed by art. 120, sch. ii of Act XV of 1877, and not by art. 62 or by art. 132 of that schedule.

THE plaintiff in this suit, which was instituted on the 28th October 1878, and was one of three suits of a similar nature, stated in his plaint that he was the proprietor of a certain "mohalla" in the city of Gorakhpur; that an ancient custom obtained in the said mohalla under which when a house situated therein was sold whether privately or in the execution of a decree, the proprietor of the mohalla received one-fourth of the purchase-money; that on the 10th July 1875 a certain house situated in the said mohalla was put up for sale in the execution of a decree held by the defendants, and was purchased by the defendants themselves for Rs. 150; that on the same day the defendants, as decree-holders, acknowledged the receipt in full of the purchase money, thereby appropriating the one-fourth thereof to which the plaintiff was entitled as the proprietor of the said mohalla. The plaintiff claimed to recover from the defendants Rs. 37-8-0 being one-fourth of Rs. 150 together with interest, stating that his cause of action arose on the 10th July 1875. The Court of first instance gave the plaintiff a decree. On appeal by the defendants the lower appellate Court held, with reference to the question of limitation raised by the defendants, that the suit was within time, being governed by art. 120, sch. ii of Act XV of 1877. The defendants appealed to the High Court.

The *Senior Government Pleader* (Lala Juala Prasad, and the *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the appellants.

Pandit Bishambhar Nath, Munshi Sukh Ram, and Maulvi Mehdi Hasan, for the respondent.

The judgments of the Court, so far as they related to the question of limitation, were as follows :

SPANKIE, J.—The Judge remarks that the cause of action in respect of two of the houses arose in 1873, and of one in 1875. But he holds, on the authority of a decision of this Court (1), that the period of limitation is governed by art. 120, sch. ii of Act XV of 1877. Art. 120 provides a limitation of six years in suit for which

(1) S. A., No. 1681 of 1874, decided the 23rd August 1875, unreported.

1879

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KIRATH  
CHAND  
v.  
GANESH  
PRASAD.

1879

KIRATH  
CHAND  
v.  
GANESH  
PRASAD.

no period of limitation is to be found in sch. ii of the Act. It is contended by Babu Dwarka Nath Banerjee, the Junior Government Pleader, on behalf of appellants, that art. 62, sch. ii of the Act, applies. He urges that the claim must be viewed as one for money payable by the defendant to the plaintiff for money received by defendant for the plaintiff's use. On the other hand, Pandit Bishambhar Nath, for the respondent, contends that art. 132 is strictly in point, and that the plaintiff has a charge on the property for the amount claimed; and he refers to the explanation below that article that the allowance and fees respectively called "*malikana*" and "*haqq*" shall, for the purpose of the clause, be deemed to be money charged upon immoveable property, in support of his contention. If the appellants' pleader be right, the limitation would be three years from the date of the receipt of the money by defendants, whereas if the pleader for the respondent has applied the proper article, the limitation would be twelve years from the date when the money sued for became due.

I am not prepared to accept as correct the contention of either of the learned pleaders. If we apply art. 62, then this claim would take the English form of an action for breach of contract, and if this be so, as between the proprietor of the mohalla and the vendor and the vendee, the component parts of a contract appear to be wanting, both as regards consideration and promise to pay money to the proprietor of the mohalla, express or implied. If this were a suit for money had and received, the sum claimed being under Rs. 500, the claim was one for a Small Cause Court. But this Court in Full Bench has decided (1) that suits of this nature are not cognizable by a Court of Small Causes. The Court observed that such a claim as one for "*haqq-i-chaharam*" "is for a zamindari due customarily payable, it is not a claim for money due on contract, nor for personal property or the value thereof, nor for damages," and the Court adds that they must not be understood to impugn the ruling that where "*chaharam*" is payable in virtue of a contract, the claim would be triable by a Court of Small Causes. The claim in the present instance is one expressly founded on ancient custom, and it cannot be maintained that the record of this ancient custom in the administration-paper is a contract, express or implied, as between the owner of the mohalla

(1) I. L. R., All., 444.

and the mohalladar. The record of the custom is some evidence of its existence, and doubtless it was entered in the administration-papers of 1833 and 1867, because the settlement officer was bound to prepare a complete record of the mahal, and to include in it all village-customs, and extra cesses and collections. As the claims in these suits are based upon ancient usage and not upon contract, the Full Bench ruling clearly applies, and this being so, one cannot say that art. 62, sch. ii of the Limitation Act governs them, still less does art. 132 apply to these cases. The "*haqq*s" referred to in the explanation and described as fees are fixed charges upon immoveable property, of which payment could be enforced by the sale of the property so charged. It is not contended here that a zamindar could recover his one-fourth share of the sale-proceeds of a house when sold by a suit to bring the house to sale by enforcement of any lien upon it. I need not, however, dwell at length upon the question of limitation, inasmuch as I am quite ready to accept the ruling of a Division Bench of this Court on the point in *Sheo Dehal v. Thakur Mathura Prasad* (1). The learned Judges in that case applied art. 118, sch. ii of Act IX of 1871, to a case of this nature, holding that there was no limitation expressly provided for such suits. I would therefore say that art. 120, sch. ii of Act XV of 1877, which represents art. 118 of the former Act, governs the limitation in these suits, and if so, all these are within time, as the limitation is six years from the time when the right to sue accrues.

STRAIGHT, J.—I concur in Mr. Justice Spankie's judgment. I was in some doubt at one time upon the question of limitation, and was disposed to think the case within art. 62, though I never had any doubt that art. 132 was inapplicable. But, upon further consideration of the matter and the decision of this Court already referred to, I think art. 120 properly applies.

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*Before Mr. Justice Oldfield and Mr. Justice Straight.*  
DURGA PRASAD (DEFENDANT) v. ASA RAM, (PLAINTIFF).\*

*Constructive Trust—Limitation.*

*B* and *D*, father and son, were jointly entitled to the moiety of certain property, *B*'s brother, *E*, and *K*, *E*'s son, being jointly entitled to the other

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\* Second Appeal, No. 425 of 1879, from a decree of Babu Abinash Chandar Banarji, Officiating Subordinate Judge of Farukhabad, dated the 14th February 1879, modifying a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 30th November 1878.

(1) S. A. No. 1681 of 1874, decided the 23rd August 1876, unreported.

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moiety. *B* and *D* were transported for life. Thirty years afterwards (*B* having meantime died) *D* returned from transportation, and asserted his right to a moiety against a person deriving his title from *E* and *K*, who had taken possession of the whole. *Held*, looking to all the circumstances of the case, that *E* and *K* had taken possession subject to a constructive trust in favour of *B* and *D*, and that accordingly *D* was entitled to assert his right, and no limitation could affect it.

ONE Bhawani Prasad and his adopted son, Kannu Lal, were jointly entitled by inheritance from one Lachi Ram, deceased, to a moiety of a certain building used as a shop. Bhawani Prasad's brother, Balkishen, and Balkishen's son, Durga Prasad, were in like manner jointly entitled to the remaining moiety. In the year 1840 Balkishen and Durga Prasad were transported for life, their wives being alive at the time. On the death of Durga Prasad's wife, Balkishen's wife having already died, Kannu Lal mortgaged the entire shop to one Asa Ram, such mortgage being dated the 30th May 1878. Asa Ram sued on his mortgage and obtained a decree for the sale of the property on the 8th November 1876. The shop was sold in the execution of this decree on the 23rd April 1879, and was purchased by Asa Ram himself. Asa Ram not being able to obtain possession of the entire shop his title to it being disputed by Durga Prasad, who had in the end of 1877 returned from transportation under a free pardon, he brought the present suit in the year 1878 to establish his title and for possession of the entire shop. Durga Prasad alleged in his written statement that he and his father had, on being sentenced to transportation for life, transferred their moiety of the shop to Bhawani Prasad, in trust to pay the income thereof to their respective wives or the survivor of them, and that Bhawani Prasad or his son Kannu Lal had so paid such income up to the date of his (Durga Prasad's) wife's death, which occurred some nine or ten years before the suit. The plaintiff in his written statement admitted the defendant's original right to the moiety in dispute, but contended that such right was extinguished, as since the defendant's transportation Bhawani Prasad and after him Kannu Lal had held the moiety adversely to the defendant. The Court of first instance held that Bhawani and after him Kannu Lal had acquired the property in dispute as trustees, and that they had so held it, paying Durga Prasad's wife the income up to her death, and that as twelve years had not elapsed from the death of his wife, the defendant's right was not extinguished. On appeal by the plaintiff the lower appellate Court, finding that no express trust had been created, that

the defendant's wife had not received the income of the property, and that she had died in 1860 or 1861, held that the defendant's right was extinguished.

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The defendant appealed to the High Court, contending that the property had been held by Bhawani Prasad and Kannu Lal in constructive trust for him, and his right was therefore not extinguished.

Mr. *Amir-ud-din*, for the appellant.

Munshi *Hanuman Prasad* and Lala *Harkishen Das*, for the respondent.

The following judgment were delivered by the Court :

OLDFIELD, J.—The plaintiff claims to obtain possession of the property which is the subject of this suit as having belonged to one Kannu Lal, whom he represents by purchase of his interests in execution of a decree. The particular portion to which this appeal has reference is the half of a shop called in the proceedings the western shop. This is claimed by the appellant, Durga Prasad, in his own right. It appears that he and his father Balkishen were transported for life thirty-seven years ago, and the former has returned under a pardon granted at the time of the Delhi Darbar ; and he avers that when he and his father left the country, they made over the property to Bhawani Prasad and Kannu Lal, his adopted son, in trust, and they collected and gave the rents to their wives, and the wife of Durga Prasad received them till her death, nine or ten years ago. It is admitted that the property belonged to Durga Prasad and his father up to the time of transportation. The lower appellate Court has found, however, that there is no proof of any express trust being made of it to Bhawani Prasad and Kannu Lal when they left, or of the appellant's wife receiving the rents, and that she died seventeen or eighteen years ago, and that Bhawani Prasad and Kannu Lal have held the property adversely to the appellant, and have acquired a title by length of possession.

This finding cannot be sustained. If the facts be as found by the lower appellate Court that Bhawani Prasad and Kannu Lal never made over the rents to the wives of Durga Prasad or his father, and themselves took possession of the property on transportation of

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the owners, although there may have been no actual and express trust, yet there are circumstances which the lower appellate Court has overlooked which amount to fraudulent conduct on their part, such as would by equitable construction convert their holding into that of trustees. The parties were nearly related to each other, living in what may be assumed to be terms of close intimacy and mutual confidence, and the appropriation of the absent relations' property could only have been carried out by a shameful abuse of the friendly and confidential terms on which they had lived, and by taking advantage of the enforced absence of the owners, who had no means of asserting their right. But the Subordinate Judge has failed to notice some evidence which shows that the wives of Durga Prasad and his father were in possession until their deaths, and that Bhawani Prasad and Kannu Lal never disputed their title, nor that of the appellant, and only asserted their right when they believed appellant to have died in transportation. This appears by proceedings taken in 1867 by Bhawani Prasad, when he claimed the property, admitting that Durga Prasad's wife had succeeded Durga Prasad, and claiming to succeed her at her death, and it is clear from a perusal of the judgment in that case that the claim proceeded on an assumption that Durga Prasad was dead. Thus Bhawani Prasad and Kannu Lal appear never to have asserted or intended to assert any title adverse to Durga Prasad. The appeal must be allowed with costs in both Courts, and the decree of the lower appellate Court modified by exempting the half of the western shop from the decree in plaintiff's favour.

STRAIGHT, J.—It appears to me that in this case the Court is properly called upon to exercise its powers of equitable interference to the fullest extent. The appellant, Durga Prasad, was, at the time of his conviction and sentence, some 30 years ago, admittedly entitled, jointly with his father Balkishen, to a half share of the western shop, part of the property now in suit. Both the wife and mother of Durga Prasad were then alive, and so long as they lived it is beyond dispute that they enjoyed the income derived from this half share, which, so I gather from the findings, was paid over to them, first by Bhawani and afterwards by Kannu Lal. I do not think it is in the least material to the view I hold as to the mode in which this case should be treated, whether the wife of Durga Prasad did

or did not die within the twelve years preceding the institution of this suit. According to my judgment the whole point is, whether from all the circumstances and the relationship between them, the Court is justified in holding that a constructive trust existed in Bhawani and Kannu Lal for and on behalf of Durga Prasad and Balkishen, from the day their imprisonment commenced. A person may declare a trust either directly or indirectly: indirectly by evincing an intention, which the Court will effectuate through the medium of an implied trust, Lewin, 6th ed., p. 95. Again, "Constructive trusts are those which the Court elicits by a construction put on certain acts of parties." Is the Court then, looking to the whole of the facts of this present case, entitled to come to the conclusion that a constructive trust is established? I am very clearly of opinion that it is, and that we are bound so to hold upon the plainest principles of equity, which in my view should be most liberally applied in a case where otherwise grave hardship and injustice would arise. By his imprisonment Durga Prasad was placed under a disability, just as much as a person "beyond the seas," or "lunatic," or "under age," and was thus deprived of the power of looking after his own interests, or asserting his rights, and during such time as it lasted it is obvious that Bhawani Prasad first and Kannu Lal, so far as his share in the property was concerned, occupied towards him a fiduciary position, of which the latter seems to have taken advantage in fraud of his "*cestui que trust*." Till Durga Prasad obtained his release it would have been impossible for him to know what had happened, his wife was dead and he does not seem to have had any children to complain of the misappropriation of Kannu Lal or any means of gathering information of his misconduct. "No time will cover fraud so long as it remains concealed, for until discovery (or at all events until the fraud might with reasonable diligence have been discovered) the title to avoid the transaction does not properly arise," Lewin, 6th ed., p. 710. No limitation therefore can affect the rights of Durga Prasad, and he is entirely justified in setting them up against the plaintiff's claim to the extent of his own interest. I therefore agree in Mr. Justice Oldfield's order both as to the shape in which this appeal is to be allowed and as to his order on the question of costs.

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*Appeal allowed.*



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August 29.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

SUKHBASI LAL (PLAINTIFF) v. GUMAN SINGH (DEFENDANT).\*

*Hindu Law—Adoption.*

*Held* that, when an adoption of a son has once been absolutely made and acted on, it cannot be declared invalid or set aside at the suit of the adoptive father.

THIS was a suit in which the plaintiff claimed a declaration that the defendant was not his adopted son, firstly, because he had not been adopted in the manner and according to the ceremonies required by Hindu law; secondly, because the defendant was not a fit and proper person to perform the plaintiff's obsequies, or to make offerings for the benefit of the souls of the plaintiff's ancestors, being devoid of education and religious knowledge and principles, and the associate of thieves, gamblers, and women of immoral character; and thirdly, because the defendant had failed to perform his part of an agreement, or compromise, in writing entered into by him with the plaintiff dated the 10th January 1873. In this agreement the plaintiff, amongst other things, agreed on his part to consider the defendant as his adopted son. The defendant set up as a defence to the suit that the plaintiff could not be allowed to deny the validity under Hindu law of the adoption, as in a petition presented by him to the Revenue Court on the 27th April 1860 he had declared that he had adopted the defendant, and that all the ceremonies of adoption required by the Hindu law had been performed, and that the defendant would succeed to his property on his death, and had confirmed such declaration by his subsequent conduct, and the defendant had been excluded from inheriting his natural father's property; and further that an adoption made according to the Hindu law could not become or be declared invalid for any reason whatsoever. The Court of first instance held that the plaintiff could not be allowed to deny the validity of the defendant's adoption under Hindu law, in the face of the petition dated the 27th April 1860 and the agreement dated the 10th January 1873, and that the adoption could not be set aside, whatever misconduct the defendant might have been guilty of towards his father, as, under Hindu law, no adoptive father had authority to set aside the

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\* First Appeal, No. 99 of 1878, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated 2nd May 1878.

adoption of a son. The Court of first instance therefore dismissed the plaintiff's suit.

The plaintiff appealed to the High Court, contending that the petition dated the 27th April, 1860, and the agreement dated the 10th January, 1873, did not estop him from denying the validity of the adoption under Hindu law, and the question of its validity should have been determined, and that a father was entitled under that law to exclude an adopted son from inheriting, and could therefore set aside an adoption.

The *Senior Government Pleader* (Lala Juala Prasad) and *Munshi Hanuman Prasad*, for the appellant.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the respondent.

The judgment of the Court was delivered by

SPANKIE, J.—The plaintiff, appellant, presented a petition in the Revenue Court on the 27th April, 1860, and personally attested it. In this petition he most distinctly states that he had adopted defendant, and that all the requisite ceremonies had been performed, and that defendant would be the owner and heir of all the petitioner's property at his death. Thirteen years afterwards, the adoptive father and the adopted son being engaged in litigation, the plaintiff filed a compromise in which he says that he will consider the defendant as his adopted son. On the 14th April, 1877, he instituted this suit to invalidate the adoption as having been informal, and to annul the agreement or compromise of the 10th January, 1873.

The plaintiff, having himself affirmed the adoption as having been fully and formally made after the performance of all the ceremonies required by the Hindu law, cannot now disaffirm it and sue for a declaration that it is invalid. Indeed, when the adoption has once been absolutely made and acted on for years, it cannot be cancelled. It is certain that an adopted child cannot renounce the family of his adoptive father. He is entirely separated from his own family when his natural father disposes of him. The adoptive father in accepting an adopted son is bound by his act, which secures to the adopted son all the rights of a son born to the family. He is as much a son as if he had been begotten by his adoptive father.

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We are not called upon to consider the point urged in the second place, that a father can, under the principles of the Hindu law, exclude his adopted son, if such son is no longer in a position and fit to perform the religious ceremonies and rites which are the chief object of adoption. We must adhere to the claim as it stands in the plaint.

The compromise of the 10th January, 1873, was filed in a suit which was determined on the terms of the compromise. If the plaintiff has suffered any wrong in consequence of defendant's omission to carry out the terms, and a new cause of action has arisen, he has a remedy, but he cannot renounce an adoption made prior to the compromise and acknowledged by himself as altogether complete and formal in 1860, by pleading now that owing to the refusal of defendant to act up to the terms of the compromise in 1873, he (plaintiff) is at liberty to consider the adoption at an end. The adoption subsists and must do so until the adopted son is dead. We dismiss the appeal and affirm the judgment with costs.

1879  
April 29.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

SHEEN AND ANOTHER (DEFENDANTS) v. JOHNSON (PLAINTIFF).\*

*Suit for infringement of patent—Act XV of 1859, ss. 19, 23, 34—"Public or Actual" user—Measure of damages—Particulars.*

*Held*, by the Court, in a suit, under Act XV of 1859, for the infringement of a patent, where the plaintiff had been in the habit of licensing the use of his invention, that the loss of the amount paid for such licence was the measure of damages.

*Per SPANKIE, J.*—The meaning of the words "publicly or actually used" in s. 23 of Act XV of 1859 discussed.

*Held, per SPANKIE, J.*—That, where the defendant did not allege in his written statement that the invention was publicly used at certain places prior to the date of the petition for leave to file the specification, but was allowed to give evidence that the invention was so used at such places, the plaintiff was not bound before trial to have called upon the defendant to supply the particulars as to such places, and such evidence was not admissible.

The plaintiff in this suit stated in his plaint that Richard Johnson was the inventor of a new thermantidote, and had, under the provisions of Act XV of 1859, acquired the exclusive privilege of

\* First Appeal, No. 7 of 1879, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 12th December, 1878.

making, selling, and using such invention in India for the term of fourteen years from the 1st June, 1870; that on the 1st September, 1875, Richard Johnson had granted and assigned to him the exclusive privilege of making, selling, and using such invention for such term; that the defendants had since such grant and assignment infringed such exclusive privilege by having without his license, at divers times, between the 1st September, 1875, and the 24th April, 1878, at Allahabad, made and sold such thermantidotes as the plaintiff had acquired the exclusive privilege of making, selling, and using under the invention of Richard Johnson, and the plaintiff claimed Rs. 1,000 as compensation for the breach of such exclusive privilege. The defendants set up as a defence to the suit, with reference to s. 23 of Act XV of 1859, that the invention was not new, inasmuch as the defendant Sheen had actually used in India a thermantidote similar to the thermantidote which the plaintiff claimed as the invention of Richard Johnson before Richard Johnson had filed his petition under Act XV of 1859 for leave to file a specification of such invention, that is to say, before 1870. At the trial of the cause the defendant gave evidence to show that thermantidotes constructed on the principle and design of which plaintiff's assignor claimed the exclusive privilege had been known and used in India long before Richard Johnson had filed his petition for leave to file a specification of his invention, but particulars of the places where the same had been used were not supplied to the plaintiff, nor did the plaintiff previous to going to trial call upon the defendant to supply such particulars. The Court of first instance found that the defendant Sheen had in April or May, 1869, at Allahabad, made a thermantidote similar to the one which the plaintiff claimed to be Richard Johnson's invention, but held that such thermantidote had not been "publicly or actually used," within the meaning of s. 23 of Act XV of 1859, before Richard Johnson had applied for leave to file the specification of his invention, and gave the plaintiff a decree.

The facts of the case will be found fully set forth in the judgments of the High Court to which the defendants appealed.

*Mr. Colvin and the Junior Government Pleader (Babu Dwarka Nath Banarji), for the appellants.*

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Messrs. *Howard* and *Hill*, for the respondent.

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Mr. *Colvin*.—The lower Court has found the facts in favour of the defendants, appellants, but has held that there was no public user such as s. 23 of Act XV of 1859 contemplates. There was, however, a public user as proved by the witnesses for the defendants, appellants. Besides the words used in s. 23 of Act XV of 1859 are “publicly or actually used.” In this case actual user has been undoubtedly established.

Mr. *Howard*.—The Judge has failed to appreciate the evidence, and has assumed that a thermantidoto on Johnson’s patented principle was made by Sheen and presented to the Masouic Lodge prior to the date of Johnson’s patent. The evidence recorded as to “general user” is inadmissible under s. 23 of Act XV of 1859 until the particular user alleged has been established. It is further inadmissible under the terms of s. 34 which requires that the particulars of the grounds on which defendants rely shall contain full information of the user alleged, and that no evidence shall be allowed at the trial which shall not be contained in such particulars. In the defendants’ particulars there was no mention of the place where general user is alleged. We submit that plaintiff is entitled to a decree on different grounds from those on which the Judge has proceeded.

Mr. *Colvin* in reply.—The defendants, appellants, were quite entitled to support their case by the evidence of the witnesses who deposed to having made thermantidotes of a construction similar to that of the plaintiff’s patented one. After the establishment of a prior user as required by s. 23 of Act XV of 1859 by Sheen, this evidence was clearly relevant, nor was it necessary for the defendants, appellants, to make specific mention of the witnesses cited on the point in their particulars of defence. If the plaintiff, respondent, thought the particulars of defence unsatisfactory, he should have applied for further particulars. He could not lie by and spring the objection on the defendant, appellant, at the last moment. S. 34 of Act XV of 1859 is analogous to s. 41 of 15 and 16 Vict., c. 83. Under this section in a similar case to the present it was held that such evidence could be given,—*Hull v. Bollard* (1). *Daw v.*

(1) 25 L. J., Exch. 301.

*Eley* (1) does not over-rule the authority of *Hull v. Bollard* (2) The two cases are clearly distinguishable. In *Daw v. Eley* (1) the plea of want of novelty was sought to be established by evidence of user in another country.

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STUART, C. J.—In this case the plaintiff, Percy Bilton Johnson of Allahabad, the assignee of Richard Johnson's patent for making thermantidotes taken out in 1870 under Act XV of 1859, instituted a suit in the Court of the District Judge of Allahabad in which he alleged that the defendants, Bradley and Sheen, had at divers times since the 1st September, 1875, infringed his patent, and that they, or one of them, had, without plaintiff's license, at Allahabad and elsewhere, publicly advertised for sale under the name of "Sheen's new improved self-working patent thermantidotes" which, it was complained, were dishonest infringements of the plaintiff's patent rights, and he claimed Rs. 1,000 as compensation for such infringement with interest to date of decree. The plaintiff further prayed for an injunction to restrain the defendants or either of them from thereafter making, selling, or advertising, under any name whatever, thermantidotes of the kind described and known as "Johnson's patent thermantidotes," and from otherwise infringing the plaintiff's exclusive rights and privileges under his patent.

The peculiarity of the thermantidote covered by the patent was shown chiefly by the manner in which the frame-work of the machine and the wheel used in its operation were made. There were other peculiarities, one a telescopic slide for, if necessary, diverting the breeze, and there was also attached to the machine a self-watering apparatus. The defendants, in their written statement, denied the alleged infringement of the plaintiff's patent, and they pleaded that the parts of the patented machine in respect of which infringement by them was alleged were not new, inasmuch as the defendant Sheen had actually used in India a thermantidote with the same frame-work and driving (or wheel) arrangement as that for which Richard Johnson had obtained his patent, "before the said Richard Johnson filed his petition for leave to file a specification thereof," i.e., before 1870. In 1875, shortly before the infringement of the plaintiff's patent, which was alleged to have commenced in September of that year, the defendant Sheen had filed a spe-

(1) L. R. 1 Eq. 38. (2) 25 L. J., Exch. 391.

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to damages. These must be in the first instance assessed, and when so determined they will form part of the decree and will be recoverable in course of execution, if not otherwise and previously settled. The damages might be assessed in this Court, but we think it more convenient that this should be done by the Judge, and we therefore remand the case to him for that purpose, with directions that he will make an immediate and peremptory appointment for hearing the parties and for his finding on that question, and that he will return the record to this Court with such finding within a week from the date of this order. In assessing the damages the Judge will be guided by the royalty which the plaintiff has been accustomed to be allowed on sales of his patent thermantidotes; and in order to ascertain that, he should examine the plaintiff and any other witnesses who may be named to the Judge as having knowledge on the subject. On receipt of the Judge's findings assessing the damages three days will be allowed for objections.

SPANKIE, J.—P. B. Johnson, the plaintiff, respondent, as assignee of a patent granted to Richard Johnson under s. 4 of Act XV of 1859, whereby he acquired the sole and exclusive privileges of making and using and selling an invention for the improvement of thermantidotes for a period of fourteen years, sues the defendants, Sheen and Bradley, for damages to the amount of Rs. 1,000, as compensation for an infringement of the patent so granted to Richard Johnson, in making and selling thermantidotes constructed with the same frame-work and driving arrangement as that for which the patent was given to the said Richard Johnson. The plaintiff also prayed that defendants might be restrained in future from making, selling, or advertising, under any name whatever thermantidotes of the kind described and known as Johnson's patent thermantidotes, and from all infringement of the patent of any kind whatsoever.

The defendants contended that Richard Johnson's invention was not a new one, the improvements patented having been in use in different parts of the country, and having been used by Sheen himself, who made in 1869, prior to the filing of any specification, a thermantidote on the same principle as that patented by Richard Johnson, and presented the same to the Masonic Brotherhood of the Lodge of Independence and Philanthropy, No. 391, in Allahabad.

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The defendants, Bradley and Sheen, were in partnership together in 1875, and it is not denied that they made thermantidotes, whilst the partnership lasted, on the same principle with regard to framework and driving arrangement as that which Sheen says that he used in 1869. Bradley contends that when the partnership was dissolved in August, 1877, he had the right to make such thermantidotes, because Sheen had transferred to him all his (Sheen's) rights and interests in the manufacture of thermantidotes. The Judge has held that there cannot be any doubt that defendant Sheen had made a thermantidote on the plaintiff's patented principle in April or May, 1869, which thermantidote he (defendant) presented to the Free Masons' Lodge. "It is impossible," the lower Court observes, "to reject the testimony of such a witness as Mr. Shircore on this point: he swears that he distinctly recollects a vote of thanks having been accorded on the occasion to Sheen at a banquet held in the Lodge: I attach little weight to the fact of presentation by Sheen not being found recorded in the proceedings of the Lodge: the evidence shows that if it was presented to the banquet-room the fact could" (or would) "not be recorded: Mr. Shircore says that the thermantidote was presented immediately after Sheen had been made a member of the Lodge, and this is proved to have been in March, 1869: there is no reason, moreover, for rejecting the evidence of the witnesses who swear that they made the thermantidote and took it to the Lodge." But the real point in the case, as it occurred to the Judge, was whether the making of the thermantidote and its presentation to the Lodge amounted to a "public or actual" user such as that contemplated by s. 23 of Act XV of 1859, so as to entitle the defendants to plead that the invention was not a new one. Citing the case noted (1), he (the Judge) had to determine whether the user was of a kind which made the invention known to the public at large, the word "known" being used in that particular sense as being part of what is called the common or public knowledge of the country. If the user has not been of that kind, the person using, although in reality he may have been the actual inventor, will not be the legal inventor as against the patentee. With this principle before his mind the Judge came to the conclusion that

(1) *Plimpton v Malcolmson*, L. R. 3 Ch. 531.



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the presentation of the thermantidote on a certain improved principle to a private body of people like the Free Masons' Lodge for private uses did not constitute a "public or actual" user of the kind the law contemplates. The lower Court remarks that with the verandah of the Free Masons' Lodge the invention stopped, probably nobody but Sheen himself knew of the existence of the invention. The public had no opportunity afforded them of knowing that there was an useful invention in the thermantidote in the Free Masons' Lodge of which they could avail themselves if they liked. This point the Judge proceeds to insist on with various arguments, which it is unnecessary to reproduce here, coming to the conclusion that Sheen adopted a new invention and then kept it to himself. He did not even impart the invention to the persons to whom he presented the thermantidote, and as far as the public were concerned they were kept in profound ignorance of the invention. Such a party, remarks the Judge, has no right to plead to an action for infringement of patent that the invention of the patentee was not a new invention. As far as the party pleading to the action is concerned, the patentee is the real and actual inventor, for the party pleading does not say that he himself was the inventor. With this view of the case the lower Court decreed the claim, but reserved the amount of damages to be ascertained at the time of execution of the decree.

The defendants appeal the whole case, and plaintiff objects that the judgment is silent regarding costs, and he is also entitled to the costs of the injunction proceedings. The defendants urge (i) that on the evidence on the record the Judge should have found that C. J. Sheen had "publicly used" in India, in Allahabad, the invention which plaintiff claims to have been his assignor's, and, therefore, plaintiff was not entitled to a decree; (ii) that on the evidence on the record the lower Court should have found that defendant C. J. Sheen had "actually used" in India, in Allahabad, the same invention; (iii) that the mode and the manner in which C. J. Sheen had used the thermantidote proved to have been made and constructed by him in March, 1869, i.e., previous to the date of plaintiff's assignor's petition for leave to file the specification, was such as is contemplated by Act XV of 1859, and the Court

below has erred in its interpretation of the words "publicly or actually used" mentioned in the Act.

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Under s. 19 of Act XV of 1859, an Act for granting exclusive privileges to inventors, an invention shall be deemed a new invention, within the meaning of the Act, if it shall not before the time of applying for leave to file the specification have been *publicly used* in India, or in any part of the United Kingdom of Great Britain and Ireland, or *been made publicly known* in any part of India, or in any part of the United Kingdom, by means of a publication, either printed or written, or partly printed or partly written. It is not necessary to quote the remaining portion of the section. All that is required for the purpose of this case has been cited.

The lower Court appears to have somewhat misapprehended the bearing of the precedent quoted by him (1). In that case the Master of the Rolls pointed out the legal sense and meaning of a first and last inventor, if the invention being in other respects novel and useful was not previously known in the United Kingdom, "known" being used in that particular sense as being part of what had been called the common or public knowledge of the country, and by this common knowledge it was not meant that every individual member of the public knew of the invention. What is meant is that if it is a manufacture connected with a particular trade, the people in the trade shall know something about it: if it is a thing connected with a chemical invention, people conversant with chemistry shall know something about it, and he (the M. R.) adds that it need not go so far. It needed not to show that the bulk or even a large number of those people knew it. If a sufficient number knew it, or if the communication is such that a sufficient number may be presumed, or assumed to know it, that will do. It may be shown that the trade had commonly used it. That is the best evidence. It may be shown that it was published and made known to the public. It had been held in a modern specification which had been enrolled in the Patent Office and not published besides, that will do. It had also been held that, as a common rule, if the description has been printed in England and published in England in a book which circulates in England, that will do. But after all it is a question of fact. The Judge must decide from the evidence

(1) *Plimpton v. Malcolmson*, L.R. 3 Ch. 531.

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brought before him whether it has, in fact, been sufficiently published to come within the definition of being made known within the realm.

We, however, are bound by the terms of our Act, and an invention by that Act is new, as we have seen, if it shall not before the time of applying for leave to file the specification have been "publicly used" in India, &c., or "been made publicly known" by means of a publication either printed or written, or partly printed and partly written, &c. This definition answers the question how the invention is "to be made publicly known" to people, and on this point no question arises here, and, therefore, the authority quoted has no bearing upon this case. Under s. 23 of the Act no action shall be defended upon the ground of any defect or insufficiency of the specification of the invention, nor upon the ground that the original or any subsequent petition relating to the invention, or the original or any amended specification, contains a wilful or fraudulent mis-statement, nor upon the ground that the invention is not useful, nor shall any such action be defended upon the ground that the plaintiff was not the inventor, unless the defendant shall show that he is the inventor or has obtained a right from him to use the invention, either wholly or in part. Any such action may be defended upon the ground that the invention was not new, if the person making the defence, or some person through whom he claims, shall before the date of the petition have publicly or actually used in India, or in some part of the United Kingdom, the invention or that part of it of which the infringement shall be proved, but not otherwise. This action has been defended under the last part of the section.

Now, the meaning of "public use" is that a man shall not by his own private invention, which he keeps locked up in his own breast, or in his own desk, and never communicates, take away the right that another man has to a patent for the same invention. The prior use of an invention need not be general. It has been held that a single instance of use would be sufficient, but it must be public. In the case of *Carpenter v. Smith* (1) Baron Alderson said that "public use" means a use in public, so as to come to the know-

(1) 9 M. and W., 300.

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ledge of others than the inventor, as contradistinguished from the use of it by himself in his chamber, and Lord Abinger said the public use and exercise of an invention means a use and invention in public, not *by* the public. Thus the Judge appears to have taken an erroneous view of the words "publicly used" as applied to an invention. It does not at all follow that because the thermantidote was presented to the Free Masons' Lodge there was no public use of it. The Masonic brethren are alleged to have used it, and even on the assumption that the lower Court's interpretation of the words could be correct, inasmuch as the public had no opportunity of knowing that there was a useful invention in thermantidotes in the Free Masons' Lodge, of which they could avail themselves if they liked, the assumption itself is hardly borne out. There is certainly no evidence in favour of it, and I am unaware that the brethren of a Masonic Lodge are bound by any rule to be silent as to benefits they may have derived from a new and useful thermantidote, or that they could not, if they pleased, freely communicate to their neighbours, friends, and families a new invention that was entirely unconnected with the secrets and mysteries of Masonry. But the Judge has misconceived the meaning of use in public as distinct from use by a man of his own invention in private.

I do not, however, think it necessary to dwell further on this point. The particulars of grounds on which defendants contended that plaintiff was not entitled to exclusive privileges, which they were bound to put in, are in effect that Sheen had himself manufactured and actually used in Allahabad in March and April, 1869, a thermantidote with the same frame-work and driving arrangement, for which a patent was given to Richard Johnson, before the specification was filed for the purpose of obtaining the patent; and further, that the principle on which the driving wheel was attached to the body was commonly known throughout the country. The terms of the Act (s. 23) are "shall have publicly or actually used" the invention. If, therefore, it can be established that Sheen made and presented the thermantidote of the kind and with the arrangements described in the defence, he may be said both by himself and by the Masonic body to have actually used that thermantidote. When, however, we come to analyze the evidence, there does not appear sufficient proof of this defence. (After commenting on the

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evidence the learned Judge proceeded :) I hold, therefore, that it is very doubtful whether any thermantidote was presented to the Lodge by Sheen in 1869, and that, if any thermantidote was sent there by him, it was probably an old one which he had repaired, and further that there is no reliable evidence to show that when repaired it worked on the principle of Johnson's patent, or that if it did, it was ever used or at work in the banquet room of the Lodge, or any where else.

There is ample evidence to show, and, indeed, it is not denied, that defendants have since the 1st September, 1875, and at the time of instituting the action, made and sold thermantidotes made on Johnson's patent in regard to their frame-work and driving arrangement, and that they have thereby infringed the exclusive privileges granted by the patent. I might, perhaps, close the case here as against the defendants. But it is right to mention that the defendants had desired to take the evidence of Ram Tahal, a black smith of Benares, of Shib Charn of Benares, of Mr. Smyth of Benares, and of Madho, a carpenter of Agra. The plaintiff's counsel objected to the record of this evidence because its admission was opposed to ss. 34 and 23 of the Patent Act. S. 34 requires that plaintiff shall deliver with his plaint particulars of the breaches complained of in his action, and the defendant shall deliver a written statement of the particulars of the grounds (if any) upon which he means to contend that the plaintiff is not entitled to any exclusive privilege on the invention. At the trial of any such action no evidence shall be allowed to be given in support of any alleged infringement, or of any objection impeaching the validity of such exclusive privilege, which shall not be contained in the particulars delivered as aforesaid. It is also specifically declared that "if it be alleged that the invention was publicly known or used prior to the date of the petition for leave to file such specification, the place where and manner in which the invention was so publicly known or used shall be stated in such particulars: provided always that it shall be lawful for any Court in which the action or proceeding is pending, or in which the issue is tried, to allow the plaintiff or defendant respectively to amend the particulars delivered as aforesaid upon such terms as shall seem fit." The Judge took the depositions of these witnesses, though at first he was disposed to

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reject them, as is clear from his rough notes of the proceedings. But he does not refer to the evidence in his judgment. Nor do I think that we should use it. The terms of the section are peremptory. Instances were cited to us showing from English cases that the plaintiff before trial should have called upon defendants to supply the particulars required as to those places and the manner in which the invention was publicly known or used. But the Act, though founded on the English Statute, is accompanied by a different procedure ; and though I do not mean to say that an application might not, perhaps, have been made on the subject to the Judge below, by what is called a miscellaneous application before the trial came on before him, I cannot say that it was incumbent on the plaintiff to make the application. The defendants might have done so, and, perhaps, ought to have done so, as in the particulars filed by them they simply say that at the time the thermantidote was manufactured, the principle on which the driving wheel was attached to the body was commonly known throughout the country, which was a very vague statement, and it does not in any way indicate that they relied on evidence in any particular place for corroboration of such a vague statement. Moreover, the defendants should have applied to the Judge at the trial if they wished to amend the particulars. This would have allowed the Judge to adjourn the case, and to enable the plaintiff to rebut the proposed evidence. Under the proviso the Judge certainly could have acted, but he was not asked to do so. I would not, therefore, interfere; nor do I think it necessary. The main defence is that Sheen himself made the thermantidote and used the same principles as Johnson did in 1869, and then presented the machine to the Lodge, which points he has failed to establish. Had the fact been so well known, and the use of the same principles so common throughout the country, the circumstances would have been stated in Sheen's letter and in the proceedings before Mr. Quinton, or surely in the grounds set out on the 10th June, 1878.

I may, however, remark that I do not admit that there is anything in s. 23 which would forbid the record of the desired evidence. The defendant, by that section, must show that he himself had used the invention, but there is nothing which stays him, after that, from proving that it was in common use in particular places. There is

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one other point. The Judge refused to take Mr. Bradley's evidence, though he was present in Court. He ought to have taken it, if the defendants wished it. But their case was in no way prejudiced by his not having done so, and they do not refer to the matter in their memorandum of appeal.

As to damages, the Judge should not have left the amount to be determined at the time of execution of the decree. The defendants did not contend that plaintiff had not suffered damages, if there had been an infringement of his rights. They simply denied that there had been any such infringement as that complained of, nor did they question the amount of damages sought to be recovered.

It appears from the proceeding in the Court of Mr. Quinton, late Officiating Judge, dated 8th May, 1878, that Johnson applied under s. 493 of the Civil Procedure Code for a temporary injunction to restrain defendants from manufacturing, selling, or advertising thermantidotes, which he asserted were built in such a way as to infringe his patent. At this time the present suit had been filed. But the Court refused to issue the injunction, because so far back as March, 1877, Johnson was aware that defendants had infringed his patent, and correspondence had ensued, which closed abruptly in May with a curt letter from Sheen, and Johnson had taken no legal steps to vindicate his alleged rights. He lay back until the 24th April, 1878, and then brings his suit, and filed an application for an injunction. The Judge accepting the rule laid down in the case of *Bovill v. Crate* (1) held that a patentee who lies by and allows a person to continue doing what he says is an infringement of his patent cannot claim an interlocutory injunction to restrain this person. Mr. Colvin for the defendants had then stated that the defendants were quite ready to keep an account, and, therefore, the Judge issued an injunction to the defendants, ordering them to prepare an account of the manufacture and sale of the thermantidotes, which are said to infringe the patent, from the date of the institution of the suit. Plaintiff was directed to pay the costs of the application. The order was appealable under s. 588 of the Code, but Johnson did not appeal it. Ordinarily the rule in Courts of Equity, as now in those of Common Law, is, when no interlocutory order has been given, to order, as part of the final judgment, an account of all the profits made

(1) L. R., 1 Eq. 388.

by defendants since the commencement of the action, and after notice that an account would be required. Mr. Quinton appears to have given such a notice. If here damages are assessed the plaintiff would not be entitled to an account prior to the suit, for the damages would be compensation for his loss of profits up to the date of suit. The plaintiff has not asked in this suit, nor did he ask in his petition dated the 24th April, for an injunction that an account should be taken. He has simply sought to recover Rs. 1,000 damages. Under these circumstances he may not be entitled to profits. The plaintiff is assignee to a manufacturer himself, and if he has been in the habit of licensing other persons to use his patent at a fixed royalty, then it may be that the loss of that royalty would be the proper measure of the damages sustained by him from the 18th September, 1875, to date of decree (1). It does not appear what fixed royalty Johnson has charged, but he says in his letter of the 16th March, 1877, to Sheen that he would be glad to arrange with him for the royalty to be paid for the use of his invention. Perhaps the best course to adopt would be to remand the case to the lower Court for further inquiry, and to ascertain what sum Johnson or his father have been in the habit of taking as a royalty, and whether this royalty has been taken on each machine made, or a lump sum has been paid for the use of the patent. Having ascertained this point, the lower Court should take an account of the machines made by defendants between the 1st September, 1875, and the date of the institution of the suit. If many machines have been made since, they should be taken into account, and the damages should be assessed according as it may be found what has been the royalty charged. On a return of the lower Court's finding on these points, we can dispose of the appeal and the objections of the plaintiff under s. 561. One week might be allowed for objections to the finding of the lower Court from the date of its return of the record. Or if the parties prefer it, we might ourselves make the inquiry suggested, and determine the point, though it would be more convenient for the Judge to do it.

I have, since writing as above, seen the Hon'ble Chief Justice's proposed order of remand, and I quite agree in the propriety of it. It will enable us to dispose of the appeal on receipt of the Judge's finding.

(1) *Penn v. Jack*, L. R., 5 Eq. 81; *Galloway's Patent*, 7 Jur. 453.

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On receipt of the Judge's finding on the issue remitted the Court delivered the following—

**JUDGMENT.**—We have now received the finding of the Judge on the remand directed to him by our order of the 26th March, and there are no objections to the finding on either side. The Judge finds that the defendants made six of the plaintiff's thermantidotes in 1876, fifteen in 1877, and five in 1878, in all twenty-six. He is also of opinion upon the evidence taken before him, that where the thermantidotes manufactured by defendants exceed twenty in number, a royalty of Rs. 40 on each machine would be a fair charge. It would thus appear that that royalty charged on the twenty-six thermantidotes made by the defendants would produce a sum of Rs. 1,040. But as that is larger by Rs. 40 than the amount claimed, we reduce the sum accordingly, and assess the damages to be paid by the defendants to the plaintiff at Rs. 1,000, and we decree that amount to the plaintiff and dismiss the appeal with costs in both Courts, but excepting the costs relating to the plaintiff's petition of objection, which petition we over-rule, and we order that the plaintiff shall bear the costs thereof. Under the circumstances it is unnecessary to make any order respecting the injunction asked for in the plaint.

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June 4.

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

**SADIK ALI KHAN (DECREE-HOLDER) v. MUHAMMAD BUSAIN KHAN**  
(JUDGMENT-DEBTOR).\*

*Execution of Decree—Transfer of Decree—Due Diligence—Act X of 1877 (Civil Procedure Code), ss. 230, 232.*

The transferee of a decree applied, while an application by the original holder of such decree to execute it was pending, to be allowed to execute it. The Court, in accordance with s. 232 of Act X of 1877, directed notice of the transferee's application to be given to the transferor and the judgment-debtor. The transferee failed to pay the court-fee leviable for the issue of such notice; and the Court dismissed his application. The transferee subsequently made a second application to be allowed to execute the decree. *Held* that such application could not be rejected, with reference to s. 230 of Act X of 1877, on the ground that due diligence had not been used on the former application to procure complete satisfaction of the decree, because such application had not been granted, and, therefore, the question whether "on the last preceding application" due diligence was used to procure such satisfaction did not arise.

\* Appeal, No. 61 of 1879, from an order of Maulvi Muhammad Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 5th February, 1879.

THE facts of this case were as follow: The holder of a decree for money applied to the Court which had passed it for its execution against the judgment-debtor. The Court, under s. 248 of Act X of 1877, issued a notice to the judgment-debtor requiring him to show cause, on the 20th September, 1878, why the decree should not be executed against him. Meanwhile, on the 17th September, 1878, one Sadik Ali, to whom the decree had been transferred by assignment in writing, applied to the Court to be allowed to execute it. The Court, in accordance with the provisions of s. 232 of Act X of 1877, directed notice of this application to be given to the transferor and the judgment-debtor. Sadik Ali failed to pay the court-fee leviable for the service of such notice, and the Court in consequence dismissed his application. On the 24th January, 1879, Sadik Ali again applied to the Court for the execution of the decree. The Court, with reference to s. 230 of Act X of 1877, refused to grant this application on the ground that on his former application Sadik Ali had not used due diligence to obtain satisfaction of the decree.

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Sadik Ali appealed to the High Court, contending that the provisions of s. 230 of Act X of 1877 were not applicable under the circumstances of the case.

Munshi *Hanuman Prasad* and Munshi *Sukh Ram*, for the appellant.

Mir *Akbar Husain*, for the respondent.

The judgment of the Court was delivered by

SPANKIE, J.—It appears that the original decree-holder had made an application to execute his decree, and notice having issued under s. 248 of Act X of 1877, the 20th September, 1878, was fixed for the hearing. In the meantime, on the 17th, appellant petitioned to have his name registered as purchaser of the decree, and to be allowed to execute the decree. An order for notice on the decree-holder and judgment-debtor was made in accordance with s. 232 of the Act. But “talabana” not having been paid, the case was struck off.

An application for execution, the subject of the present contention, was made on the 24th January, 1879, and refused by the Subordinate Judge under s. 230, because owing to his not having lodged the service money on the former application, due diligence had not

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been shown in executing the decree. It is contended that s. 230 does not apply to this case.

It is true that if a decree has been transferred by assignment in writing to any other person, the transferee may apply for its execution to the Court which passed it, and if that Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder. Then s. 230 of Act X of 1877 would of course apply. But there is a proviso, the conditions of which must be fulfilled before the Court could allow the execution. The proviso attached to s. 232 is that notice in writing of the application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution. Until, therefore, this notice has been issued, and until the objections (if any) had been heard, the Court would not be in a position to grant execution. Up to the date of the present application, and though a former application had been made both under ss. 230 and 232, and in each case an order for serving the notice required by law had been made, the application for execution had not been granted. In the one case the decree-holder ceased to have any interest in the decree, and in the other, as we have seen, *tala-bana* had not been paid, and no execution was ordered. Therefore it would seem that the present application cannot be rejected on the grounds set forth in the Subordinate Judge's order, because no former application for execution had been granted, and, therefore, the question did not arise whether "on the last preceding application due diligence was used to procure complete satisfaction of decree."

We, therefore, decree the appeal with costs, and reverse the order of the Subordinate Judge and direct him to proceed to dispose of the application for execution.

*Cause remanded.*

## APPELLATE CRIMINAL.

1879  
June 6.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

EMPRESS OF INDIA v. KARIM BAKHSH.

*Act X of 1872 (Criminal Procedure Code), ss. 149, 272—Arrest pending appeal—Admissibility of the evidence of the respondent against another person concerned in the same offence—Accomplice—Act I of 1872 (Evidence Act), s. 118.*

*K* and *B* were accused of being concerned in the same offence. *K* was first apprehended, and the Magistrate inquired into the charge against him, and committed him for trial, but the Court of Session acquitted *K*. The Local Government preferred an appeal against his acquittal, and the Magistrate arrested him with a view to his detention in custody until such appeal was determined. While *K* was so detained, the Magistrate inquired into the charge against *B*, who had meanwhile been arrested, and made *K* a witness for the prosecution, and committed *B* for trial. *K*'s evidence was taken on *B*'s trial.

*Held per* STUART, C. J. (SPANKIE, J. doubting), that *K*'s arrest was lawful, and that his evidence was admissible against *B*.

*Held per* SPANKIE, J., that, assuming that the Magistrate looked on *K* as an accused person and his arrest was lawful, the Magistrate should not have examined him as a witness against *B*, and that, assuming that *K*'s arrest was unlawful and that when he made his statement he was a free man, his evidence, if admissible, was not evidence on which a Court should place much reliance.

THE facts of this case, so far as they are material for the purposes of this report, were as follow : On the 3rd July, 1878, one Kamal was tried for an offence punishable under s. 328 of the Indian Penal Code by Mr. H. D. Willook, Sessions Judge of Azamgarh, and was acquitted. The Local Government appealed to the High Court against his acquittal. Before the appeal was admitted, Kamal was arrested by the order of the Magistrate of the District. While the appeal was pending and Kamal was in custody, he was made by the Magistrate a witness for the prosecution in the case of one Karim Bakhsh, who was charged with being concerned in the same offence as that for which Kamal was tried and acquitted by the Sessions Judge. While the appeal was still pending, Karim Bakhsh was committed to the Sessions Judge for trial on charges under ss. 328 and 392 of the Indian Penal Code, and on the 24th October, 1878, was tried and acquitted. The Sessions Judge observed with reference to the evidence of Kamal which was taken at the trial as follows : " His evidence is worthless : it affords no proof of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth."

The Local Government appealed to the High Court against the acquittal of Karim Bakhsh, contending, among other things, that the evidence of Kamal should not have been rejected by the Sessions Judge.

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The *Junior Government Pleader* (Babu Dwarka Nath Banarji),  
for the Crown.

The respondent did not appear.

The following judgments were delivered by the Court :

STUART, C. J. — Karim Bakhsh, the accused, respondent, in the present case, was one of three men, Kamal and Ilahi Bakhsh being the other two, who were believed to be accomplices in the drugging of a man named Akbar Shah with whom they fell in on their travels between Gházipur and a place called Birmi, and whom, when under the influence of the poisonous drug they had administered to him, they robbed of a large sum of money which, as the fruits of some business of his master, he was carrying home to the latter. Kamal was the first to be apprehended on the charge, and he after being duly committed by the Magistrate was tried before the Judge of Azamgarh and acquitted by that officer. But on appeal by the Government to this Court the acquittal was set aside and Kamal, the accused, was convicted and sentenced to rigorous imprisonment for three years. The evidence in the present case is substantially the same as that adduced against Kamal, the Judge taking the same view that he had done before, and also acquitting Karim Bakhsh, and the Government again appealing to us against that acquittal. I have again carefully considered all the evidence, and am clearly of opinion that the Judge has gone as far wrong in this case as he had done in the case of Kamal, and we must set aside his order. For, even irrespective of Kamal's deposition, I agree with Mr. Justice Spankie that the evidence given by the other witnesses, and in his view of which I entirely concur, is quite sufficient for the conviction of Karim Bakhsh. With respect to Kamal's evidence the Judge is of opinion that it is worthless, seeing that he considers that "it affords no proof in support of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth." This allusion to Kamal's evidence was remarked on at the hearing, and we have to consider, first, whether the Magistrate was justified in re-arresting Kamal after his discharge by the Judge, and, second, whether, while so in custody again, his statement could be received in evidence against Karim Bakhsh. I am clearly of opinion that these two questions must both be an-

swered in the affirmative. Kamal's re-arrest was not only legal, but absolutely necessary in the interests of justice. The Government appealed, as it was by law entitled to do, against Kamal's acquittal; and the effect of that proceeding was to keep him still in peril, and it may even be said on his trial, and his re-arrest was simply a measure necessary for his safe custody pending and for the purposes of the appeal, and also to secure his personal presence and his punishment should he be, as he eventually was by the decision of this Court, convicted. Such a precaution was in the highest degree reasonable, and was in my opinion fully warranted by s. 92 of the Criminal Procedure Code, which provides that a police officer may, even without orders from a Magistrate and without a warrant, arrest "any person against whom a reasonable complaint has been made or a reasonable suspicion exists of his having been concerned in a cognizable offence." For there can be no doubt that the effect of the appeal against Kamal's acquittal was to place, or replace, him in the position described in s. 92. And in this opinion I find I am supported by the ruling of a Division Bench of the Calcutta Court (Macpherson and Morris, JJ.), who in the case of *The Queen v. Gobind Tewari* (1) ordered the re-arrest of two acquitted persons under s. 92, directing them to be kept in custody till the hearing of the appeal. The reported argument addressed to the Court by the learned Legal Remembrancer, Mr. H. Bell, was extremely forcible, showing, as it did, that the power to re-arrest under such circumstances was by necessary implication vested in all Courts and officers with proper authority and jurisdiction, and that "where a Court had jurisdiction over an offence, it had of necessity power to bring the persons accused of the offence before it," quoting in support of this proposition an English case (2). Mr. Bell further successfully contended that "the admission of the appeal revived the charge against the accused, and it was absurd to treat persons accused of murder or of any other criminal offence as mere respondents in an appeal. Before the appeal was heard the accused ought to be in the custody of the law." And again "under s. 297 when the Court ordered that an accused person who had been improperly discharged be tried, it was not disputed that the Court could order the re-arrest of the accused person, though there was no express provision on

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(1) I. L. R., 1 Calc. 281.

(2) *Bane v. Methuen*, 2 Bing. 63.

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the point in the section : and in the same way the Court had equal authority to redirect the re-arrest of the accused on the admission of an appeal." These views appear to me to be eminently sensible and just, and I strongly approve them, affording as they appear to do a sound rule to guide us in the present case. On this point of the validity of Kamal's re-arrest I may add that it appears to be warranted by the spirit and principle of s. 149 of the Criminal Procedure Code, which provides that "when a complaint is made before any Magistrate empowered to commit persons for trial before the Court of Session, that any person has committed, or is suspected of having committed, any offence triable exclusively by the Court of Session, or which in the opinion of such Magistrate ought to be tried by the Court of Session, such Magistrate may issue his warrant to arrest such person, or, if he thinks fit, his summons requiring him to appear to answer such complaint," an appeal being virtually a re-trial on the same facts.

The next question is, whether the statement made by Kamal after his re-arrest and pending his appeal was admissible in evidence. I am clearly of opinion that it was, and that it ought to have been considered by the Judge, and to be considered by us now, along with the other evidence in the case. Such evidence would be admissible in an English Court—6 and 7 Vict., c. 85, s. 1, and 16 and 17 Vict., c. 30, s. 9—and I know of no law, regulation, or ruling in India excluding it. In one case the English law appears to have been followed by the Calcutta Court, *Queen v. Ashraf Shaikh* (1), and in the present instance there is the less reason for excluding such evidence, seeing that a precisely similar statement by Kamal was deliberately made by him in his own case, the facts of which were identical with the present case, which resulted in his conviction by this Court, and which statement very naturally influenced our decision.

I have only to add that I do not see that Kamal's statement can be said to have been given under duress, meaning, as that expression does, under illegal restraint or arrest: Kamal was simply by means of his arrest in safe custody for the purposes of the Government's appeal, and he was legally so. (The learned Chief Justice then proceeded to dispose of the appeal).

(1) 6 W. R. Cr., 91.

SPANKIE, J.—We have already had this case before us on the appeal of the *Queen Empress v. Kamal* (1). The latter was tried separately for the same offence as that for which Karim Bakhsh was committed to the Sessions Court. The Sessions Judge acquitted Kamal. But the magisterial authorities obtained leave to appeal to this Court from the order of acquittal. When this Court tried the appeal, the order of the Sessions Judge was reversed and Kamal was convicted and sentenced to imprisonment for three years under ss. 107 and 238 of the Penal Code.

We accepted the evidence as good against Kamal which was adduced on the present trial of Karim Bakhsh, who has also been acquitted by the Sessions Judge.

There, however, is one feature in the case which presents some difficulty. After Kamal had been acquitted by the Sessions Judge, he was re-arrested by the Magistrate, and though under duress and awaiting the result of the appeal made on the part of the Crown against the order of acquittal, the Magistrate examined him as a witness against Karim Bakhsh. If the Magistrate regarded Kamal as still in the position of an accused person, though he had been acquitted, he should not have made him a witness against Karim Bakhsh. It may be that the apprehension of Kamal on the same charge after his acquittal by the Sessions Judge was unlawful. The appeal of the Crown had not been admitted when the arrest was made, at least this would appear to be the case. S. 118 of the Indian Evidence Act makes all persons competent to testify who are able to understand the questions put to them, and can give rational answers to those questions. But if the Magistrate looked upon Kamal as still in the position of an accused person under trial, he should not have made him a witness against Karim Bakhsh, against whom the inquiry preliminary to commitment for the same offence for which Kamal had been committed was proceeding. The position of Kamal was not that of an accused person admitted to give evidence under pardon, nor was it that of a person who had been separately tried and convicted of an offence, and who was afterwards made a witness against another person charged with the same offence. Nor was this a case where several persons were

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jointly accused, and where any one of them was called as a witness either for or against his co-defendants. Assuming, however, that the re-apprehension of Kamal after an acquittal and on the same charge was unlawful, and that when he made his statement he was a free man, it may be that under s. 118 of the Act already referred to his evidence was admissible, but it is not evidence on which a Court would place much reliance, and the Sessions Judge, perhaps, has not overstated the case respecting it, when he remarks that "it affords no proof in support of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth." There is however other evidence, which in Karim Bakhsh's case has already been accepted by this Court, and which in my opinion is sufficient to establish a very strong presumption of the guilt of the respondent which his defence failed to rebut. (The learned Judge then proceeded to consider this other evidence).

*Appeal allowed.*

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## APPELLATE CIVIL.

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

KANAHIA LAL AND ANOTHER (PLAINTIFFS) v. KALI DIN (DEFENDANT) \*

*Registration—Certificate of Sale—Mortgage.*

Where the Subordinate Judge of Dehra Dún made and signed the following endorsement on a deed of mortgage of immoveable property:—"This deed was purchased on the 1st December, 1875, at a public sale in the Court of Pehra Dún, by *N* and *K*, plaintiffs, for Rs. 2,400, under special orders passed by the Court on the 23rd November, 1875, in the case of *N* and *K*, plaintiffs, against *R*, for self, and as guardian of the heir in possession of the estate left by *M*"—*held per SPANKIE, J.* that this instrument operated as a sale-certificate, and consequently, as it related to immoveable property of the value of Rs. 100 and upwards, it required to be registered.

*Held per OLDFIELD, J.*—That as the instrument operated to assign the deed of mortgage to the auction-purchasers, it for the same reason required to be registered.

THIS was a suit for the possession of a plot of land appertaining to the premises of the Victoria Hotel at Dehra Dún. The facts

\* Second Appeal, No. 1354 of 1878, from a decree of W. C. Turner, Esq., Judge of Saháranpur, dated the 16th September, 1878, affirming a decree of F. S. Bullock, Esq., Subordinate Judge of Dehra Dún, dated the 30th May, 1878.

of the case, so far as they are material for the purposes of this report, were as follows : The plaintiffs claimed the land in virtue of a transfer to them by sale in the execution of a decree of a certain deed of mortgage of the Victoria Hotel and premises, dated the 26th September, 1866. They relied on an endorsement on this deed as the proof of their title. That endorsement was in the following terms : "This deed was purchased on the 10th December, 1875, at a public sale held in the Court of Dehra Dún, by Narain Das and Kanahia Lal (plaintiffs) for Rs. 2,400, under special orders passed by the Court on the 23rd November, 1875, in the case of Narain Das and Kanahia Lal against Richard Powell for self and as guardian of the heir in possession of the estate left by Matilda Powell." This endorsement was signed by the Subordinate Judge of Dehra Dún. The defendant contended that the endorsement should have been registered as it was an instrument operating to assign an interest in immoveable property of the value of upwards of Rs 100. The plaintiffs contended that the endorsement was the order of a Court only and did not require registration. The Subordinate Judge held that the endorsement operated as a certificate of sale, and, with reference to s. 17 of the Registration Act of 1871, should have been registered, and dismissed the suit. On appeal by the plaintiffs the District Judge also held that the endorsement operated as a certificate of sale and should have been registered and dismissed the appeal.

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The plaintiffs appealed to the High Court.

Pandit *Bishambhar Nath*, for the appellants.

Mr. *Howard*, for the respondent.

The judgments of the Court, so far as they are material to the above contention, were as follows :

SPANKIE, J.—I have myself been a party to a ruling in this Court that an instrument of the nature of the endorsement on the deed of mortgage dated 26th September, 1866, would require registration, that is, I have held that a sale certificate in regard to immoveable property of above Rs. 100 in value would require registration. The endorsement on the back of this deed of mortgage, which was sold at auction and purchased by the plaintiffs,

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is, I think, and operates as a certificate of sale, and I cannot regard it as an order of Court, simply because it is signed by the Subordinate Judge. The signature may authenticate the endorsement, but the endorsement itself is a certificate of sale and a transaction that confers upon the purchasers the rights of the mortgagee and gives them an interest in immoveable property exceeding Rs. 100 in value.

OLDFIELD, J.—I concur in the proposed order for dismissing the appeal with costs. The endorsement by which the deed of mortgage was assigned to the plaintiffs as purchasers of it at auction sale is an instrument which required registration, and cannot be admitted in evidence.

*Appeal dismissed.*

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*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

PIAREY LAL (DEFENDANT) v. SALIGA AND ANOTHER (PLAINTIFFS) \*

*Wajib-ul-arz—Absconding co-sharers—Trustee—Act IX of 1871 (Limitation Act), s. 10—Limitation.*

Where a clause of the *wajib-ul-arz* of a village stated in general terms that absconders from such village should receive back their property on their return, and certain persons who absconded from such village before such *wajib-ul-arz* was framed, sued to enforce such clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to such *wajib-ul-arz*, alleging that their property had vested in such co-sharer in trust for them, *held* that before such co-sharer could be taken to have held their property as a trustee there must be evidence that he accepted such trust, and this fact could not be taken as proved by the *wajib-ul-arz*.

*Held* also that, assuming the trust to be established, as the purchaser had purchased in good faith for value and without notice of the trust, and was not the representative of such co-sharer within the meaning of s. 10 of Act IX of 1871, and had been more than twelve years in possession, the suit was barred by limitation.

This was a suit for the possession of a certain share in a village. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the defendant appealed from the decree of the lower appellate Court in favour of the plaintiffs. The defendant contended that the terms of the ad-

\* Second Appeal, No 1217 of 1878, from a decree of Maulvi Maqsd Ali Khan, Subordinate Judge of Agra, dated the 6th September, 1878, reversing a decree of Maulvi Mubarak-ul-lah, Munsif of Muttra, dated the 27th March, 1878.

ministration-paper did not create his vendors trustees for the plaintiffs, and that, assuming that his vendors had held the property in suit as trustees for the plaintiffs, the suit should have been instituted within twelve years from the date of the purchase, as he did not represent his vendors and had purchased *bona fide* for valuable consideration and without notice of any trust.

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*Babu Jogindro Nath Chaudhri*, for the appellant.

*Munshi Hanuman Prasad*, for the respondents.

The judgment of the Court was delivered by

OLDFIELD, J.—The plaintiffs bring the suit on the ground that they are sons of Gobinda and Gopal, who many years ago absconded from the village, leaving their property in the hands of their co-sharers as trustees, and they rest the proof of the trust on an entry in the administration-paper of 1864. The defendant pleaded in effect that the plaintiffs are not the persons they represent themselves to be, and that there was no such trust created as they assert, and that the property in suit was for years possessed by Sahib Ram, Param Sukh, and others, whose rights and interests therein were bought in 1912 sambat, or 22 years ago, by the defendant at public auction, and the claim has become barred by adverse possession on the defendant's part. The Court of first instance found in favour of the several pleas advanced by defendant and dismissed the suit.

The lower appellate Court has decreed the claim, holding that the plaintiffs are the persons they represent themselves to be; but it is silent as to when and how those whom plaintiffs represent deserted their village; it holds that under the entry in the administration-paper Sahib Ram must be considered to have become trustee for the absconders, and no period of limitation will bar the suit against him, or against his representative, the defendant, who purchased at auction-sale his rights and interests.

This decision is clearly open to the objections taken in appeal. Accepting the finding that plaintiffs are representatives of Gobinda and Gopal, who at some time or other deserted their villages, in order to establish the fact that Sahib Ram and the others hold their

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property as their trustees, there must be evidence that they accepted such a trust, and this fact cannot be taken as proved by a vague and general entry made in an administration-paper of a date subsequent to the relinquishment of the property by the absconders, and which refers to future years, to which Sahib Ram and the others were no parties, and which merely states in general terms that absconders from the village shall receive back their property on their return; and further, could such trust to Sahib Ram and the others be established, the claim is clearly barred by the limitation of twelve years, since the defendant is a purchaser in good faith for value from Sahib Ram and the others, and is not his representative within the meaning of s. 10, Act IX of 1871, and it is not shown that he bought with any notice of the trust.

We decree the appeal and reverse the decree of the lower appellate Court and dismiss the suit with all costs.

*Appeal decreed.*

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## CIVIL JURISDICTION.

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

KANTHI RAM (JUDGMENT-DEBTOR) v. BANKEY LAL AND OTHERS (DECREE-HOLDERS)\*

*Execution of Decree—Application to set aside sale of Immoveable Property—Auction-purchaser—Appeal—Act X of 1877 (Civil Procedure Code), ss. 311, 312, 313, 588 (m).*

*Held* that, although the auction-purchaser may not apply under s. 311 of Act X of 1877 to have a sale set aside, he yet may be a party to the proceedings after an application has been made under that section, and then, if an order is made against him, he can appeal from such order under s. 588 (m) of Act X of 1877.

THE facts of this case, so far as they are material for the purposes of this report, were as follows: Certain property was sold on the 23rd August, 1878, in the execution of a decree against one Kanthi Ram and other persons. On the 6th September, 1878, the judgment-debtors applied to the Court of first instance to set aside the sale on the ground of material irregularities in publishing and conducting it. This application was opposed by Mangni Ram, the

\* Application, No. 16B. of 1879, for revision of an order of W. Tyrrell, Esq., Judge of Bareilly, dated the 10th January, 1879.

auction-purchaser, who contended that there had been no such irregularities in publishing and conducting the sale as alleged by the judgment-debtors. The Court of first instance found on the issue raised by this contention that the sale had been irregularly published, and made an order setting it aside. The auction-purchaser appealed to the District Judge, who, finding that the sale had not been improperly published or conducted, reversed the order of the Court of first instance.

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The judgment-debtor Kanthi Ram applied to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877, contending that the District Judge had exercised an appellate jurisdiction not vested in him by law, and that his order should be set aside.

Munshi *Sukh Ram*, for the petitioner.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the opposite party.

The judgment of the Court was delivered by

SPANKIE, J.—At first sight it appears as if the first plea had force, and that the auction-purchaser was not competent to appeal to the Judge. By s. 311 of Act X of 1877 the decree-holder or any person whose immoveable property has been sold may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting the sale. By s. 312 if no such application be made, or if it be made and the objection should be disallowed, the Court shall confirm the sale as regards the parties and the purchaser. If such application be made, and if it be allowed, the Court shall set aside the sale. Now it is clear that the decree-holder or any person whose immoveable property has been sold alone may make the application to set aside the sale. The purchaser cannot *apply* under this section. S. 313 provides for the occasion on which he may apply, viz., on the ground that the person whose property purported to be sold had no saleable interest in it. S. 588 (m) gives an appeal under s. 312 for confirming or setting aside a sale. But suppose that the sale in favour of the purchaser has been confirmed, after objection has been disallowed under s. 312, and the judgment-debtor appeals to the

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Judge, cannot the purchaser appear in appeal and defend the order made in his favour? It would be very hard if he could not appear. Again, if it is part of the Court's duty where an objection has been disallowed to confirm the sale as regards the parties to the suit and the purchaser, it is surely a part of the Court's duty to hear the purchaser if he appear to answer the judgment-debtor or decree-holder's objection to the sale, and if he be heard in the first Court, may he not be heard in the second, and, if so, why not as appellant as well as respondent?

In this case the judgment-debtor made the objection. The auction-purchaser put in a statement refuting the grounds upon which the objection was made. The statement was admitted by the Court, and he was allowed to examine four witnesses. The order of the Court was against him. An appeal is allowed by law, and he appeared before the Judge as appellant. We can find no illegality in the Court's entertainment of this appeal on the merits, in that we hold that, though the auction-purchaser may not be the *applicant* under s. 311, he yet may be a party to the proceedings after the application has been made, and then if there is an order against him he can appeal under letter *m*, s. 588 of the Code.

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## CRIMINAL JURISDICTION.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

EMPRESS OF INDIA v. LACHMAN SINGH.

*Court of Session, powers of—High Court, powers of revision of—Act X of 1872 (Criminal Procedure Code), ss. 297, 472.*

*L* made a complaint against *S* by petition, in which he only charged *S* of having committed offences punishable under ss. 193 and 218 of the Indian Penal Code, but in which he also accused *S* of acts, which, if the accusation had been true, would have amounted to an offence punishable under s. 466 of that Code with seven years imprisonment. The Magistrate inquired into the charges against *S* under ss. 193 and 218 of the Indian Penal Code and directed his discharge. *L* then applied to the Court of Session to direct *S* to be committed for trial on the ground that he had been improperly discharged, which the Court of Session did, and *S* was committed for trial charged under s. 218 of the Code, and was acquitted by the Court of Session. The Court of Session then, under s. 472 of Act X of 1872, charged *L* with offences punishable under ss. 193, 195, 211, and 211 and 109 of the Indian Penal Code, and committed him for trial.

*Held* that such commitment was not bad by reason that an offence under s. 193 of the Indian Penal Code is not exclusively triable by a Court of Session.

*Held* also, *per* STUART, C. J., (SPANKIE, J., doubting), that the High Court is competent, in the exercise of its power of revision under s. 297 of Act X of 1872, to quash a commitment made by a Court of Session under the provisions of s. 472 of that Act.

*Held* also, *per* SPANKIE, J., that the Court of Session was competent, notwithstanding that *L* had only charged *S* with offences under ss. 193 and 218 of the Indian Penal Code, to charge *L* with offences under ss. 195 and 211, if such offences had come under its cognizance.

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan and Mr. Colvin, for the petitioner.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown.

The following judgments were delivered by the Court:

STUART, C. J.—In this case the accused Lachman Singh was, by an order of the Sessions Judge of Aligarh, directed to be committed, under s. 472 of the Criminal Procedure Code, for trial before the Sessions Court on charges under s. 193, as well as under ss. 195 and 211 of the Indian Penal Code, and as an abettor under s. 109. In revision it is objected before us, on behalf of the accused, that this commitment is bad, because it includes the charge under s. 193, such an offence, although triable by, not being exclusively triable by the Court of Session, and that thereby the whole commitment was vitiated and rendered invalid. It is further contended on behalf of the accused that the commitment being bad it can be quashed by this Court under the powers of revision given to it by s. 297 of the Criminal Procedure Code.

On the other hand it is argued for the prosecution that such a commitment by order of the Sessions Judge was regular and valid, but that whether it be so or not, this Court has no power to interfere with the Sessions Judge's order, as the only section of the Criminal Procedure Code which provides for the quashing of a commitment is that in the case of one made by a "competent Magistrate." It

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would appear that there was some mistake in stating that the petitioner had been expressly committed under s. 193, an examination of the record showing that even if the Judge had ordered it, no such commitment was actually made, for the record shows no charge against Lachman Singh under s. 193, and the case, therefore, against Lachman Singh rests on his commitment and charge under ss. 195 and 211, and contingently as an abettor under s. 109.

I am, however, clearly of opinion, against the contention of the accused's counsel, that even if the commitment by the Sessions Judge had included s. 193, it was perfectly regular and according to law. If the charge on which the order of commitment was made related exclusively to that section, the objection might have been allowed, seeing that an offence under s. 193, although triable by, is not one exclusively triable by a Court of Session. But in the present case the order of the Sessions Judge for the commitment of Lachman Singh, not only directed a charge under s. 193, but also two other charges of greater magnitude under ss. 195 and 211, the offences defined in which being exclusively triable by a Court of Session, a commitment on them necessarily carried with it and involved the right to inquire into and try the offence under s. 193. From the nature of the case there is one set of facts relating to all the charges, and it cannot be anticipated under which of them a conviction may take place. That will be ascertained when the trial is over, and either the innocence of the accused or the nature and extent of his guilt has been determined. But for the purposes of the accused's commitment it is perfectly competent to the Sessions Judge, while committing on the graver charges, to include the less, and, indeed, if the latter offence was excluded, the sentence on either of the other more serious offence might not be greater than that allowed under s. 193.

As to the power of this Court to interfere in such a case in revision, I have no doubt whatever. It was argued on behalf of the prosecution that the only section of the Code which provides for the quashing of a commitment by the High Court is that relating to a commitment by a "competent Magistrate," and no doubt such a power is provided for by s. 197. But we are not to understand that this was done and intended in any exclusive sense, and it cannot be

read as depriving the High Court of its large powers of revision under s. 297, and which powers in my judgment clearly cover such a case as the present.

The present application, therefore, for revision and quashing of the Sessions Judge's order of commitment must be refused, and the record will be returned to the Sessions Court for trial of the accused according to law.

SPANKIE, J.—Sundar Lal, patwari, was tried on the 2nd May, 1879, by the Sessions Judge of Aligarh, under s. 218 (1) of the Indian Penal Code, and acquitted under the following circumstances: On the 1st October, 1877, Baldeo Singh, karinda and agent of Lachman Singh, zemindar, accused Sundar Lal of making alterations in his diary and khata regarding certain sums received from cultivators. The entries in the diary on the 27th April showed the

(a.) Bijay Ram, Rs. 184.  
Dip Chand, Rs. 200.  
Murli, Rs. 200.  
(b.) Bijay Ram, Rs. 104.  
Dip Chand, Rs. 240.  
Murli, Rs. 240.

payment of the sums marginally noted (a.) by the tenants whose names are given. These figures were said by the kariuda to have been altered, and to have been originally entered as they appear in the margin (b.)

Sundar Lal at this time was patwari of Lalpur, but was about to be transferred to another village, of which Ratan Lal was patwari, both villages belonging to the same zemindar. On the 8th May Sundar Lal complained to the Collector that the zemindars of Lalpur would not sign his diary, which was sent to the Tahsildar, and reached him on the 10th May. The diary had thus passed out of the patwari's possession. On the 11th May Sundar Lal and Ratan Lal exchanged papers, and Ratan Lal gave Sundar Lal a receipt for his, stating that he had compared and found them all correct. On the 13th May Ratan Lal wrote a petition informing the Tahsildar that he had received the papers on the 12th, and that he had found erasures in them. Inquiry followed, and finally there was the complaint of the 1st October, and the patwari Sundar

(1) Whoever, being a public servant and being as such public servant charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows is incorrect with intent to cause or knowing it to be likely that he will thereby cause loss or injury to the public or any person, or with intent thereby to save or knowing

it to be likely that he will thereby save any person from legal punishment, or with intent to save or knowing that he is likely thereby to save any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

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Lal was discharged in December, 1877. Then an application was made to the Sessions Judge to direct a commitment, on the ground that Sundar Lal had been improperly discharged. This application was made by Baldeo Singh, karinda and agent of Lachman Singh, aforesaid, and was granted by the Sessions Judge on the 8th April, 1879. After the case had been gone into in the Sessions, and Sundar Lal had been acquitted, the Sessions Judge, under s. 472 of Act X of 1872, committed Lachman Singh, Baldeo Singh, Ratan Lal, and Dip Chand, witnesses, to the Sessions Court on various charges.

Lachman Singh, the petitioner now before us, was charged in the calender in that he on the 1st October, 1877, "with intent to cause injury to Sundar Lal, instituted, or caused to be instituted, a criminal proceeding against him, knowing that there was no just or lawful ground for such proceeding against him, and that such criminal proceeding was instituted on a false charge of an offence punishable with imprisonment for seven years, viz., forgery of a document purporting to be kept by a public servant as such; and thereby committed an offence punishable under s. 211 of the Indian Penal Code." He was also charged with abetment of the offence. In the order for the commitment of Lachman Singh, dated 17th May, it is stated that Lachman Singh and Baldeo Singh are charged under ss. 193, 195, 211, and 211 and 109. Baldeo Singh was charged in a similar way, Ratan Lal under s. 195, and Dip Chand under ss. 193 and 195 of the Indian Penal Code.

It is contended that the Sessions Judge exceeded his powers: a charge under s. 193 is not exclusively triable by the Sessions Judge, nor had Lachman Singh ever given any deposition in the case: a charge under s. 211 was not exclusively triable by the Court of Session: any charge under s. 195 is groundless as regards petitioner, inasmuch as the charge in support of which the offence under s. 195 is alleged to have been committed was a charge made under s. 218 of the Indian Penal Code, in which the punishment proscribed does not exceed three years imprisonment: these are the main contentions into which we can go. We cannot enter into the merits of the case which involve either the guilt of Sundar Lal, or rather the truth of the charges proffered against him by Lachma

Singh and Baldeo Singh, or the guilt or innocence of these persons on the charges upon which they are to be tried. The minor objections may be good or bad, they might be properly pleaded on the trial.

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I entertain doubts myself whether we are at liberty to cancel a commitment made by a Sessions Judge under s. 472 of Act X of 1872. No provision has been made in the Code which expressly gives us power to do so, whereas there is a provision by which a commitment once made by a competent Magistrate can, under s. 197, be quashed by the High Court only, and only on a point of law. On the other hand if a Court of Session which is competent, under s. 472, to charge a person for certain offences committed before it, or under its own cognizance, if the offence be triable by the Court of Session exclusively, charges a person for offences not triable by itself exclusively, the commitment might, perhaps, be regarded as "a material error in a judicial proceeding," and be set aside under the first paragraph of s. 297 of Act X of 1872. We are told in the statement of objects and reasons of the draft bill as now prepared for the amendment of Act X of 1872, that s. 477 has been framed so as to allow a Court of Session to charge a person for giving false evidence before itself,—“a power of which such Courts were unintentionally deprived by s. 472 of the present Code.” If the commitment had been made solely on a charge of giving false evidence, the charge would not have been one exclusively triable by the Court of Session and I should have then felt a very pressing difficulty as to my power of cancelling the commitment before trial, though I should have found no difficulty in doing so *after* trial, if the case had come before the Court in any shape of appeal or revision. Happily it is not necessary now to consider whether I have power under s. 297 before trial to set aside the commitment made by a Sessions Judge under s. 472 of the Code.

I have already noticed the charge actually preferred against the petitioner Lachman Singh. It is a charge under s. 211, and the offence charged was one punishable with imprisonment for seven years and upwards. Such an offence is exclusively triable by a Court of Session—s. 211, column 7, sch. IV., Act X of 1872. The complaint of the 1st October, 1877, disclosed what,

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if true, would have been forgeries on the part of the patwari Sundar Lal and would have amounted to an offence under s. 466 of the Indian Penal Code, which is an offence punishable with imprisonment for seven years. It is true that the complaint of the 1st October, 1877, was headed under ss. 193, 218 of the Indian Penal Code. But the offence disclosed in the body of the complaint went beyond these sections, and, as observed above, placed the patwari in a position which might have resulted in his commitment and conviction under a charge punishable with imprisonment for seven years. It is also true that the patwari was committed under s. 218, and that the Sessions Judge had directed the commitment. But the Sessions Judge was not bound to go so minutely into the case, under s. 296, as to order an inquiry into other offences of which the accused might have been guilty. He had to see whether he had been improperly discharged on the charge preferred against him. When the case was tried under s. 218, and what appeared to the Sessions Judge to be the true facts came under his notice, and very serious offences, exclusively triable by himself, appeared to have been committed by the original complainants and others, he had, under the terms of s. 472, the power to charge them with these offences. They were not committed before the Court of Session but came under its cognizance. The words adopted in the amended Act are "committed before it or brought under its notice in the course of a judicial proceeding." But the words in s. 472 "committed before it or under its own cognizance" will bear the same interpretation as "brought under its notice in the course of a judicial proceeding," and in point of fact these words appear to have been adopted in consequence of the ruling of the Calcutta High Court in *Reg. v. Nomal* (1), and which is also marginally cited opposite s. 477 of the proposed amended Act. In this way Mr. Justice Norman's remarks refer to s. 172 of Act XXV of 1861, but the same words are used in that Code as in s. 472 of Act X of 1872.

I now pass on to the actual wording of the order of commitment, dated 17th May. I would say that as s. 211 involves an offence which in the latter part of the wording of the section is exclusively triable by the Court of Session, and which from the proposed charge was evidently the offence which the petitioner was considered by

(1) 4 B. L. R., A. Cr. 9.

the Court of Session to have committed, the Sessions Judge was not acting illegally in adding other charges for offences which, had they stood alone, would not have been exclusively triable by him. The graver charge carried the others into Court with it. But the offence under s. 195 is also triable exclusively by the Court of Session, and if this was an offence which came under the notice of the Court of Session when trying the charge under s. 218, he was at liberty under s. 472 to charge the petitioner with it. Whether the charge can be supported on the trial is not for us to determine before trial.

The offence under s. 193 is not exclusively triable by a Court of Session, but, as already insisted on, when the Court of Session had already ordered the commitment under s. 211 (the latter part of the section) and s. 195 for offences which were exclusively triable by him, there was no illegality in adding the other charge under s. 193. He might have omitted to do so in the order of commitment, and have added the charge after the commitment had been actually made and during trial.

If the petitioner, as he alleges, never committed this offence, he can obtain a good deliverance for himself by proving his innocence. I would dismiss the petition.

*Petition dismissed.*

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*Before Mr. Justice Oldfield.*

EMPRESS OF INDIA v SUKHARI.

*Contempt of Court—Act XLV. of 1860 (Penal Code) s. 174—Act X of 1872<sup>2</sup> (Criminal Procedure Code), ss. 471, 473.*

Where a settlement officer, who was also a Magistrate, summoned, as a settlement officer, a person to attend his Court, and such person neglected to attend, and such officer, as a Magistrate, charged him with an offence under s. 174 of the Indian Penal Code, and tried and convicted him on his own charge, *held* that such conviction was, with reference to ss. 471 and 473 of Act X of 1872, illegal.

THIS was a reference to the High Court by the Sessions Judge of Azamgarh under s. 296 of Act X of 1872. Mr. J. Vaughan, who was a settlement officer appointed under Act XIX of 1873,

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and who was at the same time a Magistrate of the first class, in the exercise of the powers conferred upon him by Act XIX of 1873, summoned to his Court one Sukhari, whose attendance he considered necessary for the purpose of certain business before him. Sukhari neglected to attend on the day specified in the summons, whereupon Mr. Vaughan, acting as a Magistrate of the first class, issued a warrant for his arrest, and on his appearance proceeded to try him for the offence of disobeying the lawful order of a public servant, an offence punishable under s. 174 of the Indian Penal Code, and convicted him of that offence. The Sessions Judge considered that the proceedings of Mr. Vaughan were contrary to law, and referred the case to the High Court for orders.

The High Court made the following order :

OLDFIELD, J.—I am of opinion that the conviction is illegal with reference to the provisions of ss. 473 and 471 of the Criminal Procedure Code.

By the former section no Court shall try any person for an offence committed in contempt of its own authority, and an offence under s. 174 of the Indian Penal Code is such an offence, and the procedure prescribed in s. 471 shows that it was not intended that an officer should try such an offence in his capacity as Magistrate when committed before him in his capacity as a settlement officer. It is enacted that the Court may, after making such preliminary inquiry as may be necessary, either commit the case itself or send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged.

When the officer presiding over the Court exercises revenue as well as Magistrate's jurisdiction, it will not be a proper compliance with these provisions for the officer presiding to make the case over to himself as Magistrate; that will not be sending the case to any Magistrate within the meaning of the section. The obvious intention of the law is that the officer before whom the offence was committed shall not charge and try the accused person on his own charge.

*Conviction quashed.*

## APPELLATE CIVIL.

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June 16.*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.*NARHAR SINGH AND ANOTHER (DEFENDANTS) v. DIRGNATH KUAR  
(PLAINTIFF).\**Hindu Widow—Maintenance.*

*Held*, in a suit by a Hindu widow for maintenance, that the circumstance that she was not a childless widow but had had a son who had died a minor subsequently to his father, was not a ground for reducing the allowance she would have been reasonably entitled to had she been a childless widow.

THIS was a suit in which the plaintiff, a Hindu widow, claimed a declaration of her right to an allowance of Rs. 150 per mensem for her maintenance. A five annas four pies share in each of certain villages formed the joint and undivided estate of three brothers, Darshan Singh, Narhar Singh, and Harihar Singh; Darshan Singh died leaving a widow Dirgnath Kuar, the plaintiff in the present suit, and a minor son, Rudr Mani Singh, who died in December, 1876. While Rudr Mani Singh was alive, the defendants had maintained his mother, but they ceased to do so after his death. Dirgnath Kuar accordingly instituted the present suit for maintenance, alleging that as the widow of Darshan Singh and mother of Rudr Mani Singh, she was entitled to maintenance, that the defendants were in possession of the family estate, that they refused to maintain her, and that regard being had to the position of the family she was entitled to an allowance of Rs. 150 per mensem. The defendants contended, *inter alia*, that the share of the annual profits of the family estate received by her husband amounted to Rs. 2,558-4-0 only, and that Rs. 10 per mensem was a sufficient allowance for the plaintiff as she was a childless widow. The plaintiff alleged that that share amounted to Rs. 2,747-14-4. The rent-rolls relating to the estate showed that that share amounted to Rs. 3,141-1-10. The Court of first instance observing that one-third of the profits received by a husband had often been fixed by the Courts as a proper maintenance for his widow, that in some cases no regard had been had to the amount of profits received by him, that the rents entered in the rent-rolls of an estate were for different reasons never realised, and that an estate incurred other expenses than the usual expenses,

\* First Appeal, No. 178 of 1878, from a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 24th August, 1878.



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considered that, regard being had to the position of the family, and the food, dress, and servants, &c., required by a widow in the family, Rs. 60 and not less was a proper monthly allowance for the plaintiff, and it gave the plaintiff a decree accordingly.

The defendants appealed to the High Court, contending that the sum allowed to the plaintiff as maintenance was in excess of what she was entitled to with reference to the principle on which maintenance to Hindu widows is allowed.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Lala Ram Prasad, for the appellants.

The *Senior Government Pleader* (Lala Juala Prasad) and Munshi Hanuman Prasad, for the respondent.

The judgment of the Court was delivered by

STRAIGHT, J.—This case resolves itself into a mere question of what is a reasonable amount to fix as the allowance for maintenance to the respondent. It must be taken that, with the exception of the first, all the other grounds of appeal are abandoned, in fact, while admitting the liability of his clients to the payment of maintenance to the respondent, the whole of the argument and observations of the pleader for the appellants were adduced to the question of amount and to the extravagance of the sum fixed by the Subordinate Judge. It being conceded, therefore, that the respondent is entitled to maintenance at the hands of the appellants, the duty cast upon this Court is to determine, as a matter of equity, whether, having regard to all the circumstances of the case, the amount decreed in the Court below is unreasonable. It was urged on the part of the appellants, that the position of a "Hindu mother" of a child deceased since her husband's death is, so far as concerns the principle upon which allowance of maintenance has to be computed, a very inferior one to that of a "Hindu widow" without a child or children. As a childless widow, it is said, many ceremonial duties devolve upon her, entailing expenses which ought to be taken into account, whereas if she bear a son, most if not all of those pass over to him or to his representatives. In plain terms it amounts to this, that a "childless widow" is entitled to allowance on a higher scale than a "widowed mother." There was nothing either in the argument addressed to us nor in

the circumstances of this case itself to induce us to draw such a distinction here, and it is impossible to avoid remarking that if matters of feeling can be admitted, and we are not sure they should not in arriving at the amount of what is a reasonable allowance, the case of a "widowed mother" deprived of her only son and the contingent advantages that might have accrued to her had he survived seems the more deserving of sympathy and consideration. It is a fact not to be lost sight of in this case that, down to the death of the respondent's son, Rudr Mani Singh, on the 2nd December, 1876, the appellants made due provision for her and her child according to their position and the family custom, but immediately after the latter's decease they stop the allowance not only for the one but as to both. Such a proceeding appears indefensible and altogether inconsistent with the position they now take up. They are actually in enjoyment of the profits of the share of the villages to which, had the respondent's husband lived, he would have been entitled, and it is relatively to the amount of these profits that the sum to be allowed here should be calculated. No precedents were quoted to us fixing any principle of computation to apply to a case like the present, and it may well be that there are none, for the question that now arises involves equitable considerations that must of necessity be affected by the peculiar circumstances of each individual case. In our opinion this appeal should be dismissed and the order of the Subordinate Judge be affirmed with costs.

*Appeal dismissed.*

*Before Mr. Justice Oldfield and Mr. Justice Straight.*

**LACHMI NARAIN LAL AND ANOTHER (DEFENDANTS) v. SHEOAMBAR LAL AND OTHERS (PLAINTIFFS).\***

*Pre-emption—Limitation—Act XV of 1877 (Limitation Act), sec. ii, art. 10.*

*Held* in a suit for pre-emption, where the property had been purchased by the mortgagee in possession, that the purchaser obtained physical possession of the property under the sale, not from the date of the sale-deed, but when the contract of sale became completed.

*Held*, therefore, that, the contract of sale having become completed on the payment of the purchase-money, the suit being brought within one year from the date of such payment, was within time.

\* Second Appeal, No. 1871 of 1878, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Allahabad, dated the 17th September, 1878, modifying a decree of the same Judge, dated the 15th May, 1878.

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THIS was a suit for pre-emption founded upon a contract contained in a village administration-paper. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the defendants appealed from the decree of the lower appellate Court in the favour of the plaintiffs. The defendants contended that the suit was beyond time, not having been instituted within one year from the date of the sale.

*Lala Lalia Prasad*, for the appellants.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Munshi Hanuman Prasad*, for the respondents.

The judgment of the Court, so far as it related to the above contention, was as follows :

OLDFIELD, J.—The plaintiffs sue to obtain possession of a certain share in property sold under a deed of sale dated 15th October, 1873, to the defendants by right of pre-emption under the conditions of the administration-paper of the mauza. It appears that the vendees are mortgagees in possession of the property, and, under the terms of sale, Rs. 200 were to be paid in cash to the vendor (mortgagor), and Rs. 98 to go in redemption of the mortgage. The plaintiffs brought a suit asserting their right to recover the property sold by pre-emption, but it was dismissed on 31st March, 1875, by the Court of first instance, on the ground that the sale contract had not become complete so as to give a right of pre-emption by reason of the vendor not having received the purchase-money, and this decision was affirmed in appeal. The vendor subsequently sued to recover the purchase-money with interest from the vendees, and obtained a decree on the 18th March, 1877, for Rs. 298, the consideration of the sale, and Rs. 70 interest. The plaintiffs have now brought the present suit, and the lower appellate Court has decreed their claim, subject to their depositing in Court, within thirty days of the decree becoming final, Rs. 200 payable as purchase-money, and Rs. 98 for redemption of the mortgage. The objections taken in second appeal are invalid. The limitation law which governs this case is Act XV of 1877, and the period will run from the date on which the purchaser takes under the sale sought to be impeached physical pos-

session of the property sold. As the purchaser in the case before us was also the mortgagee in possession, he must be held to have taken physical possession under the sale from the date when the contract of sale became complete; his possession as mortgagee became then possession as proprietor under the sale, and with reference to the former decision between the parties, the contract only became completed on the payment to the vendor of his purchase-money, and it is not urged that a year has elapsed from that date so as to bar the suit. There is nothing to show that the lower appellate Court has mis-construed the terms of the administration-paper which support the plaintiffs' preferential right of pre-emption. The second objection fails, as we cannot re-open a question decided between the parties in the former suit. The fourth and fifth pleas have no force. The plaintiffs cannot be liable to pay to defendants the interest decreed against them in the suit brought by the vendor to recover his purchase-money; it was no part of the purchase-money, which is all the plaintiffs can be called on to pay, and the former suit brought by the plaintiffs will be no bar to the present suit, as with reference to the decision in the former suit, the plaintiffs have now obtained a new cause of action.

The appeal is dismissed with costs.

*Appeal dismissed.*

### FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield*

**GAURI SHANKAR AND ANOTHER (PLAINTIFFS) v. MUMTAZ ALI KHAN (DEFENDANT).\***

*Government Ferry—Lease—Regulation VI of 1819—Illegality of Contract—Act IX of 1872, s. 22.*

*M* took a lease for three years of a Government ferry and covenanted with the Magistrate, who granted the lease, not to underlet or assign the lease without the leave or license of the Magistrate. *M* subsequently admitted *B* as his partner to share with him equally in the profits to be derived from the lease. Held that such partnership was not void by reason of the covenant not to underlet or assign the lease.

Special Appeal No. 119 of 1872, decided on the 1st August, 1872, (1) overruled.

\* First Appeal, No. 111 of 1878, from a decree of Maulvi Nasar-ul-lah Khan, Sub-judice Judge at Bāgh, dated the 22nd July, 1878.

(1) Unreported.

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v.  
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SHAMBAH  
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KHAN.

The facts of this case appear sufficiently for the purposes of this report from the order of the High Court (SPARKES, J. and OLDFIELD, J.) referring the case to the Full Bench.

OLDFIELD, J.—Mumtaz Ali, the defendant and respondent, held a farming lease of certain ferries from Government, from 1st October, 1875, to 30th September, 1878, and by agreement dated 18th October, 1875, admitted one Badal to partnership in the said lease. It is asserted by the appellant that one Khushali Ram obtained a decree against Badal, and caused his share in the farm to be attached, and that a *sazawal* was appointed to make collections, the income remaining in the hands of defendant, respondent. Subsequently defendant, respondent, bought, in the name of Khwaja Hasan, the said decree, and advertised for sale Badal's interest in the farm, and on 29th September, 1877, Badal sold his interest to plaintiff, who satisfied the decree. Plaintiff now seeks to have his right declared to receive profits under the terms of the agreement dated 18th October, 1875, and to superintend and keep an account, as before, of the income: also to recover his share of the profits, under the terms of the agreement, from 1st October, 1876, to September, 1877, a period of one year, with interest. The defendant, respondent, does not dispute that he admitted plaintiff to partnership in the farm under the deed dated 18th October, 1875, but pleads that the contract is absolutely void with reference to the provisions of section 23 of Act IX of 1872, as it was illegal to admit a *shikmi* partner in the ferry farm, or to sub-lease it, under the provisions of s. 2, Regulation VI of 1819, and paragraphs 11 and 12, Circular Order No. 22 of 1874, and paragraph 11 of the conditions of the ferry farm granted by the Magistrate.

There were other pleas to the effect that, under the deed of 18th October, 1875, Badal obtained no right of possession or power of superintendence, &c.; that, during the first year of the partnership, the boats and other things belonging to Badal were sold in execution of the decree, and during the second year he could not collect the said materials for the bridge, and committed a breach of contract; and on defendant's petition the Magistrate, on 16th October, 1876, declared the *shikmi* partnership and sub-farm to be invalid, and disallowed it, and held defendant, respondent, respon-

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 MUMTAZ ALI  
 KHAN.

sible for everything; and in consequence of the Magistrate's order defendant, respondent, cancelled the contract with Badal from October, 1876. There are also pleas to the effect that the account of profits is wrong; that defendant, respondent, did not realise the profits as alleged, and a considerable sum of money is due to defendant, respondent, from Badal and his representatives on account of profits, expenses, and losses relating to the first year of Badal's partnership. The above are the principal pleas taken by defendant, respondent, in the Court below. The lower Court dismissed the suit, holding that the contract on the part of Mumtaz Ali, defendant, and Badal is absolutely void, upon the grounds taken by the defendant, which have been referred to above, and a decision of this Court (1) has been cited in support. In my view the decree of the lower Court cannot be maintained. There is nothing in Regulation VI of 1819 which makes a contract of the nature of that between defendant and Badal illegal, nor has the Circular Order No. 22 of 1874 of the Executive Engineer, Allahabad Division, the force of law, assuming that the contract is forbidden by that Circular; so we cannot say that this contract is void under the two first grounds in s. 23 of the Contract Act, and we cannot hold it to be void under any of the other grounds which render a contract absolutely void. Its object is not fraudulent. We cannot say that it involves or implies injury to the person or property of another, or that the Court can regard its object as immoral or opposed to public policy. There will be nothing, therefore, to render this contract void absolutely under the Contract Act; and though Mumtaz Ali, in making it, may have transgressed the terms of his lease from Government, the contract as between him and Badal will be valid and an action on it maintainable, which may be enforced for damages, if not for specific performance. But if the lease is perused, it is not clear that a partnership contract of the kind was contrary to the conditions of the lease. The only section pointed out as disallowing it is s. 11; but that would appear to refer to a sub-lease or a transfer and not to a co-partnership, and the remedy is, under it, in the Magistrate's own hands, by cancelling the original lease and fining the farmer; and when this has not been done, and there is knowledge of the lease; it may be presumed the authorities did not object.

(1) Special Appeal, No. 119 of 1872, decided on the 1st August, 1872, unreported.

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The grounds, therefore, on which the lower Court has dismissed this suit cannot be sustained, and the suit should be tried on the merits. It may be noticed that it is asserted that the Magistrate on defendant's, respondent's, petition of the 16th October, 1876, disallowed the partnership, and defendant, respondent in consequence cancelled it : whether or not it ceased to have effect validly is a point which must be tried with the other points raised in the pleadings. Since the lease to defendant, respondent, Mumtaz Ali, has come to an end, so much of the relief sought as asks for supervision of the farm cannot be granted, assuming this relief was otherwise allowable.

I would reverse the decree and remand the suit for trial on the merits ; costs to follow the result.

SPANKIE, J.—I am quite of the same opinion, and would make the order proposed. But before doing so, as the judgment of this Court (1) appears to support the judgment of the lower appellate Court, it would, perhaps, be better to refer the case to the Full Bench in order that the point may be considered, whether or not the agreement made with the plaintiff in this case is null and void for the reasons assigned by the lower appellate Court.

OLDFIELD, J.—I concur in making the proposed reference.

Pandit *Ajudhia Nath*, Babu *Oprokash Chandar Mukerji*, and Lala *Ram Prasad*, for the appellant.

Mr. *Conlan*, *Shah Asad Ali*, and *Mir Akbar Husain*, for the respondent.

The following judgments were delivered by the Court :

STUART, C. J.—The opinions expressed in the order of reference in this case appear to me to be substantially sound. Badal's claim under his agreement with Mumtaz Ali could not be made good against the Government, or in any way against the profits of the ferry, but only against Mumtaz Ali himself personally, and in that light could only be measured in damages, and a contract between him and Mumtaz Ali to any other effect could not be enforced. I am clear, therefore, that Badal had no claim for specific performance,

(1) Special Appeal, No. 119 of 1872, decided on the 1st August, 1872, unreported.

so far as the subject-matter of the Government lease to Mumtaz Ali Khan was concerned. This, however, does not exclude Badal's claim against Mumtaz Ali for damages. As to the case decided by this Court in 1872 (1), I am not prepared at this distance of time to say that it is exactly in point. I observe that the judgment in that case states that it was admitted by the appellant's pleader that the claim for possession of a share of the ferry in suit was unmain-  
tainable, and it clearly was so; but if so the claim there was different from that pleaded in the present case, which is that of a *shikmi* partner suing for his rights under his personal sub-contract. I cannot say more about the judgment of 1872 (1), as the record has long since gone back to the district, Banda, from whence it came. I would answer in accordance with the referring order.

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PEARSON, J.—The view taken by the learned Judges who have made this reference appears to me on consideration to be more correct than that taken in the former decision of 1872 (1).

OLDFIELD, J. (SPANKIE, J., concurring)—We adhere to the view already expressed in our order of remand.

The Division Bench, following the judgment of the Full Bench, decreed the appeal, and remanded the case to the Court below for trial on the merits.

*Cause remanded.*

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## APPELLATE CIVIL.

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*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

HIRA LAL (PLAINTIFF) v. GANESH PRASAD AND OTHERS (DEFENDANTS).

*Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 42, 83, 241, cl. (b)—Vendor and Purchaser—Agreement—Jurisdiction of Civil Court—Cause of Action—Assessment of Revenue.*

The purchaser of a certain estate paying revenue to Government agreed with the vendors, shortly after the sale, that they should retain a certain portion of such estate free of rent, and that he would pay the revenue payable in respect of such portion. In 1853, in a suit by the vendors against the purchaser to enforce this agreement, the Sudder Court held that the revenue payable in respect of such portion of the estate was payable by the purchaser. In 1875, on a fresh

(1) Special Appeal, No. 119 of 1872, decided on the 1st August, 1872, unreported.



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PRASAD.

settlement of the estate, the representatives in title of the purchaser applied to the settlement officer to settle such portion of the estate with the representative in title of the vendors. The settlement officer refused this application, but it was subsequently allowed by the superior revenue authorities. The representative in title of the vendors then sued the representatives in title of the purchaser in the Civil Court, claiming "that he might, in accordance with the agreement between the vendors and the purchaser, be exempted from paying revenue in respect of such portion, as against the defendants, without any injury to the Government: that the defendants might be ordered to pay, as heretofore, such revenue: and that the defendants might be ordered never to claim or demand from him any revenue they might be compelled to pay in respect of such portion."

*Held per SPANKIE, J.*, that, assuming that the agreement between the vendors and the purchaser was enforceable, the act of the defendants in moving the settlement officer to settle such portion of the estate with the plaintiff gave the plaintiff a cause of action. Also that, the object of the plaintiff's suit being to obtain a declaration that, as between him and the defendants, the latter were bound to pay revenue in respect of such portion, the suit was not barred by cl. (b), s. 241 of Act XIX of 1873. Also that, although the revenue authorities might regard the decision of the Sudder Court as binding on the parties then before the Court, for the currency of the then settlement, that decision, that settlement having expired and s. 83 of Act XIX of 1873 having come into force, could not control the power of the revenue authorities to settle the land in question with the plaintiff who was its proprietor.

*Held per OLDFIELD, J.*, that, with reference to ss. 43 and 83 of Act XIX of 1873, the Civil Courts could not relieve the plaintiff of his liability to pay revenue.

*Held*, by the Court, that, in the absence of proof that the agreement by the purchaser was intended to extend beyond the period of the settlement then current, and that it was binding upon his representatives in title, the plaintiff could not obtain the declaration which he sought.

THIS was an appeal to the High Court from an original decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 29th February, 1879, dismissing the plaintiff's suit. The facts of the case are stated in the judgment of Spankie, J.

Mr. Conlan, Mr. Howard, and Lala Ram Prasad, for the appellant.

The Senior Government Pleader (Lala Juala Prasad), Munshi Hanuman Prasad, and Babu Oprakash Chandar Mukarji, for the respondents.

SPANKIE, J.—The plaintiff, appellant, alleges that Sheo Ghulam Singh, Beni Singh, and Maidan Singh were the owners of a six annas share in taluka Mawaiya in the district of Allahabad: they,

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joining with the owners of a five annas share in the same estate, sold, under a deed of sale of which the correct date is not known, their zamindari rights to one Ghulam Muhammad, on condition that the vendors should remain, in perpetuity, in possession of 1,845 bighas of land as their "*malikana*," without payment of rent, and the rateable Government demand, the latter being payable by the vendees, along with the revenue of the remaining portion of the estate sold: Ghulam Muhammad sold his right to Ghulam Ali, who again sold it to Dulhin Begam, the wife of Ghulam Ahmad, and she transferred it to the defendants: the original vendors sold, on the 7th January, 1851, one half share of the resumed *malikana*, also called "*nankar*," land to Lala Madho Prasad: in the course of time after his death this share passed into the hands of Lala Makhan Lal by auction, in execution of a decree, held on the 20th January, 1873: Makhan Lal died on the 15th June, 1877, and the present plaintiff is his brother, and the proprietor and in possession of the lands in dispute: in the recent settlement the defendants prayed the Settlement Officer to exempt them from the payment of the rateable revenue of these lands, and to make the plaintiff responsible for it: the Settlement Officer on the 28th January, 1875, rejected their prayer: on appeal to the Commissioner, that officer, on the 15th August, 1875, held the plaintiff responsible in future for the rateable revenue payable on the land: the Board of Revenue, on the 1st September, 1875, and again in review on the 23rd December, 1875, affirmed the Commissioner's order.

The plaintiff desires to enforce the original contract between the vendors and vendees, whose representatives the parties to the suit are, as against the defendants, and he avers that on the 14th March, 1853, a similar claim regarding this "*nankar*" land was decided by the late Sudder Dewany Adawlat in appeal (1): that decision was final in the case, and is binding upon the present defendants. The relief sought by the plaintiff is as follows: (i) That in accordance with the original contract entered into between the contracting parties, the plaintiff be exempted from paying the rateable revenue as against the defendants without any injury to Government: (ii) That the defendants be ordered to pay, as here-

(1) *Shoo Ghulam Singh v. Dulhin Begam*, 8 S. D. A. Rep., N. W. P., 138.

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tofore, the revenue of those lands: (iii) That the defendants be ordered never to claim and demand from the plaintiff the revenue they may have to pay for those lands.

The defendants contended that the suit was not cognizable by the Civil Court, and the Settlement Courts had full power to assess the revenue upon the plaintiff, the revenue being payable by the person in proprietary possession of the land, whether or not it has been held as "nankar" and rent-free. They also contend that the plaint discloses no cause of action against them: the settlement orders are not an award of right in favour of defendants with respect to the land: the Commissioner and Sudder Board of Revenue simply declare the Government right. They further urge that the original vendees never remitted the rent in perpetuity (*naslan bad naslan*), and if they did, the remission could only be legally in force as against the grantor personally, it cannot be enforced against his heirs and representatives: the decree of the Sudder Dewany Adawlat (1) referred to by plaintiff cannot control the authority and powers of settlement officers whose orders are final and conclusive. They also state that the extent of the "nankar" land has been wrongly given in the plaint.

The Subordinate Judge laid down two issues: (i) Whether the settlement order holding the plaintiff liable to pay the Government revenue gives rise to a cause of action against the defendants or not, and whether a suit for a cancelment of such a settlement proceeding is cognizable by the Civil Court or not: (ii) Whether the defendants' predecessors, having remitted in perpetuity the rent of the land in suit, had taken on themselves the payment of it, and whether that act can be enforced in the plaintiff's favour as against the defendants or not. On the first issue the Subordinate Judge held that, if the plaintiff claims to have been originally in possession of the land as "*lakheraj*" without payment of revenue, and that the Settlement Officer had assessed it with revenue, the Settlement Officer's order might be the ground of an action, but the suit should be instituted against Government; but if the plaintiff means that the original vendees had taken upon themselves to pay the revenue of the land in dispute, the cause of action would accrue on the date on

(1) *Sh 20 Ghulam Singh v. Dulkin Begam*, 8 B. D. A. Rep., N.-W. P., 138.

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which the plaintiff was compelled to pay the revenue for defendants : it might be assumed that when the defendants presented this petition that the plaintiff should be made to pay the revenue, their proceeding gave a cause of action to plaintiff : but the Settlement Officer was competent to cancel the *maafi* grant by a zamindar, and to make the settlement with any one, and although the plaintiff does not ask that his land should continue free of rent, yet his prayer, that the liability for payment of the rent of the land in suit which has been imposed on him by the Settlement Officer may be removed from him and transferred to the defendants, is one opposed to the terms of s. 241 of Act of XIX of 1873. On the second issue the Subordinate Judge's decision is not quite clear. He appears to think that the plea of defendants was based on s. 81 of Act XIX of 1873, and he cites it as in the margin (1) : the defendants had stated that the agreement was entered into in 1830, when the term of settlement expired : none of the parties to the contract were alive, and the performance of the contract could not be enforced against the defendants. This plea, however, the Subordinate Judge considers that he is not called upon to determine, because he finds that the suit in the shape in which it has been brought is not cognizable. He, therefore, dismissed the plaintiff's claim with costs. It is now urged in appeal that the order of the superior settlement authorities declaring that the plaintiff was liable to pay rent on his holding having been made at the instance of the defendants, the lower Court is wrong in finding that there was no cause of action at the date of the suit. The second plea urges that the land being held rent-free under a valid and subsisting contract, and the defendants having ignored that contract in their petition to the Settlement Officer, plaintiff was compelled to sue them in order to establish their liability to himself to continue to pay to the Government the rent due on the holding under the terms of the contract. The third plea insists that as the land had been held rent-free for years prior to the passing of Act XIX of 1873, under a judicial decision, the Settlement Officer had no power to assess the

(1) Grants of land held under a written instrument (whether executed before or after the passing of this Act) by which the grantor expressly agrees that the grant shall not be resumed, shall be held valid as against him (but

not as against his representatives after his death) during the continuance of the settlement of the district in which the land is situate, which was current at the date of the grant.

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said land with revenue: the lower Court had applied s. 241 erroneously to this suit: the plaint raises no question in or by which the interests of Government are concerned or prejudiced: the purpose of the suit is to have it declared that, as between plaintiff and defendants, the latter are liable for the payment of the rent of the former's holding: the present claim in no way tends to weaken the security for the payment of the Government revenue: it is not denied that the land is liable for the Government demand.

On the assumption that the plaintiff can sue to enforce the original contract of sale, as made between the original vendors and vendees, it must, I think, be held that the act of defendants in moving the Settlement Officer to assess the revenue of the land against the plaintiff, and to relieve them of all the liability on account of it, did give a cause of action to the plaintiff. I would, therefore, determine the first plea in his favour. I would also say that the object of the suit appears to be one for the purpose of obtaining a declaration that, as between plaintiff and defendants, the latter are bound to pay the rateable revenue assessed upon the land, and, therefore, it is not one which is barred by s. 241, clause (b), Act XIX of 1873. The plaintiff does not sue to set aside the order of the Revenue Courts. Nor does he deny that the Government is entitled to its revenue upon the land. But he prays that the defendants may be ordered for the future to pay the amount themselves in accordance with the terms of the contract. With such an order in his favour plaintiff believes that he would be able to recover annually from the defendants whatever he may have been obliged to pay to the Collector as Government revenue. The circumstances of this case are not those of a grant of rent-free land by a proprietor. The vendors sold all their rights and interest in their property to the vendees, reserving to themselves the possession of 1,845 bighas of land to be held by them rent-free as "*nankar*," and the vendees bound themselves to pay the *malguzari* of these lands to the Government. It appears to have been part of the sale consideration, or of an "*ikrar-nama*" or deed of agreement dated the 26th April, 1831, executed after the sale-deed. I fail, therefore, to see that these lands can be regarded as rent or revenue free grants by the proprietor or any other unauthorised person to which the provisions of the Bengal Regulation XIX of 1793, Act X of 1859, or of Act XIX of 1873 could apply. There was no application made by a

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proprietor to resume a rent-free grant, or to assess rent, as payable to the proprietor, on land held rent-free previous to the passing of Act XIX of 1873 under a judicial decision. Nor was there any claim to hold land free of revenue not recorded as revenue-free. The lands were held rent-free by a private arrangement between the original vendors and vendees, and by the same private arrangement, or one executed shortly afterwards, the vendees bound themselves to pay the revenue rate on the lands to the Government. This, therefore, is not a case in bar of which it might be pleaded that s. 79, and other sections of Act XIX of 1873, applied. The payment of the Government revenue has always been made, and the arrangement made in 1831 did not endanger it. These remarks dispose of the fourth and fifth pleas in appeal.

With regard to the third plea, I cannot say that the Revenue Courts were bound by the decision of the late Sudder Dewany Adawlat (1), dated the 14th March, 1853. The Commissioner, whose order of the 15th April, 1875, was affirmed by the Sudder Board of Revenue, states in his order that the decree was not with the papers in the record before him, but he did not think that it could have been intended to extend beyond the time of the then existing settlement, and irrespective of all the proprietary changes that might take place in these particular lands. But with reference to the terms of s. 83 of Act XIX of 1873 he considered that the land was chargeable with the payment of the Government revenue. This section provides that no length of rent-free occupancy of any land, nor any grant of land by the proprietor, shall release such land from its liability to be charged with the payment of Government revenue. The defendants moved the Settlement Officer to make it so chargeable as they were not the proprietors, whereas the plaintiff was the proprietor. Indeed, he now mentions that he is so. It is the rule of the Settlement Department to make under s. 43 of Act XIX of 1873 the settlement with the proprietor of the land. In this instance, the defendants did not deny the plaintiff's title to the land, and the judicial decision on which so much stress is laid is, as will be presently seen, not one declaring the land revenue-free as against the Government, but one that declares the defendants then could neither claim rent nor revenue from the plaintiff in

(1) *Shoo Ghulam Singh v. Dulkin Begam*, 8 S. D. A. Rep., N.-W. P., 138.

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that suit. I cannot, therefore, hold that the Commissioner and Sudder Board of Revenue were debarred by that decision from assessing the proprietor in possession of the lands with the Government revenue charged upon it, and in exempting the defendants who were not the proprietors of the land, and were not so recorded in the new settlement record, from all liability with respect to it. In the suit before the Sudder Dewany Adawlat in 1853, the Settlement Officer had enhanced the jama of the taluka, and had been induced by the defendants to charge the rateable rent of the increase upon the plaintiff's predecessors. The Settlement Officer by an order dated the 15th January, 1839, did so. The Judges of the Sudder Dewany Adawlat certainly do find that the conditions of the sale-deed were that the vendors should be allowed to retain possession of 1,845 bighas of sir-land free of either rent or revenue. But the Court also held that the Settlement Officer was of course justified in assessing the jama of the taluka with reference to the produce of every bigha which was not held rent-free under a recognised Government grant, but he was not at liberty to demand payment from those who had been by private contract exempted from payment of either rent or revenue, contrary to the agreement entered into between the parties. The Court's judgment goes on to show that in 1831 the Benares Court of Appeal, by order dated the 6th May, distinctly ordered the *malguzari* of the 1,450 bighas should be taken from the purchasers, Shah Muhammad Khan and others, and *not* from the old zamindars. But this Ghulam Muhammad was one of the original vendees whose names were recorded in the sale-deed, though the real purchaser was Ghulam Ahmad, whose dependents they were, and as the Judges of the Sudder Dewany Adawlat found that these vendees had admitted their liability to pay the revenue, and in fact had paid it after the sale had fully operated, they very reasonably would and did hold that the defendant in that suit was not at liberty to take rent in any shape from the then plaintiffs, for the defendant was Dulhin Begam, the widow of Ghulam Ahmad referred to above as the real purchaser. During the current settlement at least she could not divest herself of the liability to continue to pay the Government revenue on these lands. When the settlement had expired and Act XIX of 1873 came into operation, s. 83 of which declares that

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no length of rent-free occupancy, nor any grant of land made by the proprietor, shall relieve such land from its liability to be charged with the payment of Government revenue, the judicial decision of the Sudder Dewany Adawlat in 1853 might readily be regarded by the Revenue Courts as binding on the parties then before the Court, and for the term of the current settlement, and as not in any way controlling their power to assess the land and settle it with the admitted proprietor. So far then as the third plea contends that the superior Revenue Courts had no power to assess the land in dispute with revenue, and if it is meant to urge that they exceeded their jurisdiction in doing so, it fails altogether.

I am now brought to the consideration of the most important plea in the case, and that is the second. If the alleged contract is valid and still subsisting between the parties, it may be that the plaintiff is entitled to the declaration for which he prays. There is no doubt that there was a deed of sale, and that there was subsequently on the 26th April an "*ikrar-nama*" or agreement between the original vendors and vendees, which latter instrument the Judges of the Sudder Dewany Adawlat believed to have been executed because the vendors doubted the good faith of the vendees. The Court also has held that this "*nankar*" land was included in the sale. The judgment states that "in a proceeding of the Benares Court of Appeal under date 6th May, 1831, the Court find it stated that Shah Muhammad Khan and others, petitioners, had represented to the Court that Mehdu Singh and other zamindars had sold their eleven-anna share to them with the reservation (*ba istasnai*) of 1,450 bighas *sir do biswe nankar malikana haq-i-khud*, and that as the *malguzari* of this excepted land was payable by them (the petitioners) and not by the sellers, they prayed that the revenue might be demanded from the petitioners, and not from the sellers, and that the *dastaks* which had been issued against the latter might be recalled, and an order to the above effect was passed accordingly: the obvious meaning of the passage in the vernacular above quoted is that the old zamindars had stipulated that they should be allowed the 1,450 bighas *free of rent*, and the Court cannot accept the construction which the respondent would put upon the words, *viz.*, that the land was altogether excepted from the sale, nor that suggested by the Principal Sudder Amin, *viz.*, that all the



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petitioners meant was that the revenue of the 1,450 bighas should be paid by the old zamindars through them, and not direct into the Government treasury."

We must, therefore, accept the Court's judgment as final as to the fact that the land in suit was included in the sale in 1831, and this, indeed, is not denied by the defendants. We must also admit that the vendees remitted the rent of 1,450 bighas, and also that they bound themselves to pay the Government revenue on the land.

But the Court's judgment is by no means clear as to the exact conditions of the deed and *ikrar-nama* on certain very material points, and if the decision is obscure on these points, the decree is not clearer. The Court decreed in favour of the appellants (before the Court) for possession of the land exempt from the payment of revenue and *vasilat* to the amount claimed by them. But the decree is silent as to the duration of this exemption from paying revenue. Neither the sale-deed nor the *ikrar-nama* were before the Court; the latter instrument, indeed, was filed in appeal, but was not produced in the Court of first instance. The Court, therefore, would not admit it in evidence, considering that it would be improper and opposed to judicial usage to do so. At the same time, however, they state that they "are enabled to form an opinion regarding its contents and purport from the secondary evidence adduced by the appellants." This admission of secondary evidence to prove the contents of a document which they might have allowed to be filed, if they pleased, would now be regarded as equally opposed to judicial usage and practice. It is most unfortunate that the document was not considered, as the excuse assigned by the appellants for not producing it before the Subordinate Judge was not to my mind at all satisfactory. They said that the opposite party had by a ruse contrived to get temporary possession of it, and that while it was thus in their custody they fraudulently made certain alterations in it, which rendered its production in a Court of Justice impossible. Yet they did produce it before the *Sudder Dewany Adawlat* and they do not explain how they again got possession of it. The other side might have said with some show of reason that it was not produced in the first Court, because it bore marks of fraudulent alteration, and that its production before the Appellate Court was with a view to prejudice the case against respondent.

However, the Court accepting the secondary evidence has not gone further in declaring the nature and conditions of the deed of sale, or after-agreement, than this that the sellers were to be allowed to retain possession of 1,450 bighas of sir-land free from either rent or revenue. The decision does not say whether the arrangement is one solely between the parties and to have force during the current settlement, or whether it is binding for ever on the parties or their heirs and successors. I cannot find in the judgment any trace of a condition making the arrangement one that was to last for ever. I can understand the vendors receiving for their own support a certain extent of sir-lands, but no plausible reason is assigned why the vendee should pay the rateable revenue on the land beyond the term of settlement, apparently then about to commence and lasting for thirty years. We meet with cases where indulgence is shown for a term of settlement, but I have not found it usual in my experience that vendees, in leasing a plot of land to the vendors and remitting the rent, have also undertaken to pay the rateable Government demand on the land for ever.

I would also add that there seems to have been contention from the very first regarding the transaction. We have the authority of the Sudder Dewany Adawlat for the fact that a deed of agreement was executed in April, 1831, to make matters clearer, because the vendors had commenced to doubt the good faith of the vendees. If this were so, the conditions could not have been very fully stated in the deed of sale. It may be urged that the circumstance that the defendants and their predecessors have continued to pay the revenue for so many years is in favour of the assumption that they were bound by the contract, and must do so for ever, as long as they were simply transferees by private sale. But I would answer to this, that so far back as 1831 litigation commenced in regard to the plot, that it recommenced in 1853, when the opportunity presented itself, and that when the settlement had expired, and a new settlement and record were in progress, the defendants at once endeavoured to relieve themselves of any liability for the revenue of this land. These circumstances show that the liability was not at first readily accepted, and has not been admitted subsequently. There was little expectation after the judicial decisions in 1831 and 1853 that any attempt to impose rent upon the land would be successful, and since 1853

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and during the currency of the settlement any attempt to make the plaintiff responsible for the revenue would have been hopeless. But when Act XIX of 1873 had come into force, a new settlement was in progress, an opportunity was offered whereby when the proprietary nature of the plaintiff was admitted and recorded, the latter should be treated as proprietor and made responsible for the revenue. If the defendants are to be made liable to plaintiff for the revenue assessed upon his holding, it must be shown that they are so liable under the terms of the contract and deed of agreement. These instruments are not before us. The decision of 1853 was binding on the parties then before the Court, one of whom was the widow of the real purchaser of the zamindari rights of the vendors. That decision binds those parties, but as pointed out it nowhere declares the extent of the liability of the successors of the original vendors. In the absence of the deed of sale and of agreement I cannot say whether or not the arrangement was to go beyond the current settlement, and whether or not the contract bound the present defendant. I have advanced reasons for believing that the arrangement was not one that bound the parties "*naslan bad naslan*," and in the absence of the original documents and of any evidence of a conclusive character that the arrangement was intended to be something more than a personal liability attaching to the vendors during the current settlement, and that it was to be regarded as imposing a charge on the property of the vendors in future, I could not decree the present claim, which is one of unusual character, unsupported by the evidence which a Court ought to have before it when declaring any liability under a contract, and resting solely upon a decision passed more than twenty years ago, and which appears to be conclusive solely as between the parties then litigating.

Entertaining this view of the case, I would dismiss the appeal and affirm, though for different reasons, the decision of the lower Court with costs.

OLDFIELD, J.—Upon the questions which arise in this appeal, I am of opinion that the plaintiff, who is proprietor of the land, cannot escape his liability to the Government for the revenue assessed on this land, with reference to the provisions of ss. 83 and 43, Act XIX of 1873, since by s. 83 no length of rent-free occupancy of any land, nor any grant of land made by the proprietor,

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shall release such land from its liability to be charged with the payment of Government revenue, and by s. 43 it is obligatory on the Settlement Officer to make the settlement with the proprietor of the land. The effect of these sections appears to me to be to render the plaintiff liable to pay revenue to the State upon this land, and the Court cannot give the relief sought, as it would in effect annul the settlement and relieve the plaintiff of a liability for revenue to the State, which the law imposes, nor could it be granted in this suit to which the Government is no party.

The plaintiff further seeks substantially to have it declared that as between him and defendants the latter are bound to make good to the plaintiff the rateable amount of revenue assessed on the land and payable by plaintiff to the State; and he seeks to impose this liability with reference to a breach of the terms of the original contract by which the original vendors, now represented by plaintiff, sold their property to the original vendees, from whom it has passed to the defendants; one of the conditions of the sale being that the original vendors should not be liable to pay revenue on a certain quantity of land, exempted from the sale, and which is part of that now in suit. But I am not of opinion that this liability for breach of the original contract is shown to be incurred by defendants. There is nothing to show that that liability was other than one personal to the parties to the original contract. The defendants are some of a series of purchasers of the property sold, and the circumstance of their purchasing the property will not suffice to saddle them with a liability for breach of the conditions of the original contract.

The decision of the Sudder Dewany Adawlat on which plaintiff relies was one in which Dulhin Begam from whom the defendants have obtained the property was defendant, but it cannot be said to have gone so far as to fix this liability on these defendants, by determining that the possession and ownership of the property sold under the original contract, carries with it a liability on the part of whoever is owner to make good loss to the original vendors or their representatives incurred by a breach of the original contract. I therefore concur in dismissing the appeal with costs.

*Appeal dismissed*

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July 14.

Before Mr. Justice Oldfield and Mr. Justice Straight.

HUSAIN SHAH AND OTHERS (PLAINTIFFS) v. GOPAL RAI AND ANOTHER  
(DEFENDANTS.)\*

*Land-holder and Tenant—Determination of title under a lease by a Revenue Court on an application under s. 39 of Act XVIII of 1873 (N.-W. P. Rent Act)—res judicata.*

The plaintiffs in this suit, land-holders, had caused a notice of ejectment to be served on the defendants, their tenants under a lease, on the ground that the tenancy had expired. The defendants applied to the Revenue Court, under s. 39 of Act XVIII of 1873, contesting their liability to be ejected on the ground that the lease was a perpetual lease. The Revenue Court held, with reference to the word "*istimrari*" contained in the lease, that the lease was perpetual, and the defendants were not liable to be ejected. The plaintiffs thereupon sued in the Civil Court for the cancelment of the word "*istimrari*" in the lease, on the ground that it had been inserted fraudulently. *Held*, on appeal from the decree of the lower appellate Court dismissing the suit as barred by the decision of the Revenue Court, that it was not so barred, the matter in dispute being peculiarly within the jurisdiction of the Civil Court, and not one which a Revenue Court was competent finally to determine on an application under s. 39 of Act XVIII of 1873.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiffs appealed from the decree of the lower appellate Court dismissing their suit.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and Babu Jogindro Nath Chaudhri, for the appellants.

Munshi Hanuman Prasad, for the respondents.

The judgment of the High Court (OLDFIELD, J. and STRAIGHT, J.) was delivered by

OLDFIELD, J.—The relief sought by the plaintiffs is to have the word "*istimrari*," or perpetual, cancelled in a deed of lease executed on the 19th July, 1864, on the ground that this word was fraudulently entered in the deed by the defendants in collusion with the writer of the deed. It appears that the lessees, who are the defendants, respondents, before us, applied in the Revenue Court, under s. 39 of Act XVIII of 1873, to contest a notice of ejectment which the plaintiffs, appellants, had served on them, and in that matter they pleaded that they had a right of occupancy and held under a perpetual lease.

\* Second Appeal, No 75 of 1879, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 8th November, 1878, affirming a decree of Muhammad Mir Badshah, Munsif of Bulandshahr, dated the 6th December, 1877.

The Revenue Court decided that no right of occupancy had accrued, since twelve years had not expired since the expiration of the ten years which was the term of the lease, *i. e.*, from 1864 to 1874, but it went on to decide that, with reference to the entry of the word *istimrari*, the lease must be held to have been given in perpetuity. There is clearly some inconsistency in the finding, which makes the lease out to be at the same time for a term of ten years and in perpetuity, but we are not concerned with the point now. The lower appellate Court has dismissed the suit on the ground that it is barred with reference to the decision of the Revenue Court. The decision of the lower appellate Court cannot be maintained. The question in this suit is the fraudulent insertion in a deed of a word by which the intended character of the deed is altered, and the object of the suit is to have the terms of the deed corrected. This is a matter peculiarly within the jurisdiction of a Civil Court, and was not one of those which a Revenue Court was competent finally to decide in the matter of an application made under s. 39, Act XVIII of 1873, however sufficient the decision may have been for the purpose of disposing of that application. We reverse the decree of the lower appellate Court and remand the case for trial on the merits. Costs to follow the result.

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v.  
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*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

KANAHIA AND ANOTHER (PLAINTIFFS) v. RAM KISHEN AND  
OTHERS (DEFENDANTS). \*

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1879  
July 15.

*Jurisdiction of Civil and Revenue Courts—Act XVIII of 1873 (N.-W. P. Rent Act),  
ss. 93, 95.*

The plaintiffs in this suit claimed a declaration of their proprietary right in respect of certain lands and possession of the lands, alleging that the defendants were their tenants, and liable to pay rent for the lands. The defendants, while admitting the proprietary right of the plaintiffs, alleged that they paid the revenue assessed on the lands, that they paid no rent, and that the plaintiffs were not entitled to rent, and they styled themselves tenants at fixed rates. *Held*, on appeal, that, as the defendants substantially denied the proprietary title of the plaintiffs, and set up a title of their own, the claim of the plaintiffs for a declaration of their proprietary right and of their right to demand rent was a matter which the Civil Court must decide, leaving the plaintiffs to sue in the Revenue Court to eject the defendants, and to recover rent, if the position of the defendants as tenants were established.

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\* Second Appeal, No. 207 of 1879, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Saharanpur, dated the 11th January, 1879, reversing a decree of Babu Ishri Prasad, Munsif of Deoband, dated the 13th September, 1878.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiffs appealed from the decree of the lower appellate Court dismissing the suit as cognizable by a Court of Revenue and not by a Civil Court.

Munshi *Hanuman Prasad*, for the appellants.

Pandit *Nund Lal*, for the respondents.

The judgment of the Court (SPANKIE, J. and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The plaintiffs sue to obtain possession and a declaration of their proprietary right in respect of 37 bighas, 13 biswas of land, alleging that defendants are their tenants and liable to pay rent for the land. The defendants, while professing to admit the plaintiffs' title to be owners, say that they pay the revenue on this land, pay no rent, and deny the plaintiffs' right to rent, and they call themselves tenants at fixed rates, and they aver that the case is not one cognizable by the Civil Court. The Munsif has disallowed this objection: he holds that their defence substantially amounts to a denial of the proprietary title of the plaintiffs and sets up their own title, and he proceeds to decide in favour of the plaintiffs' title and right to demand rent from the defendants, while he refers the plaintiffs to the Revenue Court to eject the defendants and to recover rent from them. The lower appellate Court has reversed the decree and dismissed the suit on the ground that the Civil Court has no jurisdiction to try it. We are of opinion that the view taken by the Munsif is correct. The defendants do in substance deny the plaintiffs' title as owner and set up their own, when they aver that they have a right to pay the revenue on the land to the Government, and are not liable to pay rent to the plaintiffs. The latter have clearly a cause of action for obtaining a declaration of their right to be owners and to demand rent from the defendants, and this matter is one which the Civil Court must decide, leaving the plaintiffs to have recourse to the Revenue Court to eject the defendants, and to recover rent from them, supposing their position as tenants is established. We reverse the decree of the Subordinate Judge, and remand the case for trial on the merits. Costs to follow the result.

*Cause remanded.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

1879  
August 5.

GANGA RAM GUARDIAN OF KUAR GIR PRASAD, A MINOR, (DEFENDANT) v. BANSI  
AND ANOTHER (PLAINTIFFS.)\*

*Effect of Registration and Non-Registration—Optional and Compulsory Registration—Act VIII of 1871 (Registration Act)—Act III of 1877 (Registration Act), s. 50.*

*Held* that under s. 50 of Act III of 1877 a document of which the registration was compulsory under that Act, and which was registered thereunder, took effect, as regards the property comprised in the document, as against another document of a prior date, relating to the same property, executed while Act VIII of 1871 was in force, and which did not require, under that Act, to be registered, and was not registered under it.

THIS was a suit for money charged upon certain immoveable property, the claim being based upon a bond dated the 20th August, 1875, given by the owners of the property to the plaintiffs. Under Act VIII of 1871, the Registration Act in force at the time of the execution of this bond, the registration of the bond was optional. The bond was not registered. On the 27th September, 1877, the property in suit was purchased from the obligors of the bond by one Ganga Ram on behalf of the defendant Kuar Gir Prasad, a minor. The deed of sale required under the provisions of Act III of 1877 to be registered, and it was duly registered. It was contended on behalf of the defendant that the plaintiffs' bond being unregistered could not, under the provisions of s. 50 of Act III of 1877, take effect, as regards the property in suit, as against the deed of sale which, although of a later date, was duly registered under that Act. The Court of first instance allowed this contention, but for reasons which it is not necessary to state held that the property was liable irrespective of the bond for a portion of the money sought to be charged on it, and gave the plaintiffs a decree to that amount in respect of the property. On appeal by the defendant the lower appellate Court held that the provisions of s. 50 of Act III of 1877 were not applicable in this case, and consequently the deed of sale, being of a later date than the bond, did not take effect as against the latter document, and gave the plaintiffs a decree enforcing the entire charge they claimed.

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\* Second Appeal, No. 1196 of 1878, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 10th June, 1878, modifying a decree of Babu Ganga Saran, Munsif of Khair, dated the 30th January, 1878.



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v.  
BANSI.

The defendant appealed to the High Court, raising the same contention as he had raised in the lower Courts.

Babus *Oprokash Chandar Mukarji* and *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Ajudhia Nath* and *Lala Harkishen Das*, for the respondents.

STUART, C.J.—The Munsif was clearly right in holding that the registered sale-deed, although subsequent in date, had preference over the unregistered bond, and the Subordinate Judge as clearly wrong in deciding to the contrary. In stating this conclusion it is at the same time difficult to resist a certain feeling of its injustice, for it seems unreasonable to allow a discretion, and at the same time to impose a penalty or disability on its exercise. That is plainly what has been brought about. The last Registration Act, III of 1877, not less than its predecessors, allows a discretion as to the registering or not registering certain documents of which the bond in this case is one, and if such an instrument has been legally and validly prepared and executed, and is effectual for its purpose, it might be justly contended it should be so as from its date. Yet one can appreciate the policy, and, in a real sense, the convenience, of compelling, as far as may be, the registration of the contracts of the people of this country. The Subordinate Judge's remark that "agreeably to the principle of the law no law can have retrospective effect," is generally correct, and a right once conferred by law cannot be taken away by implication, and if we had nothing but s. 50 itself, we might possibly have applied these principles of law to the present case, and have held that the sale-deed of 1877, although registered, had no priority over the mortgage of 1875. But the "explanation" appended to s. 50 removes all doubt, and may be said to have a repealing effect by expressly negating the application of the principles of law referred to. On the other hand, Act III of 1877 does not affect, in the sense of invalidating, the class of instruments mentioned in s. 18. It simply says that such instruments, if registered, shall have preference over any other unregistered document relating to the same property, and such a law it was quite competent to the Legislature to pass. The meaning, however, of s. 50 of Act III of

1877, together with the explanation appended to it respecting the three preceding Registration Acts, is too clear, and as that section provides the law to be applied to the present case, we cannot do otherwise than hold that the sale-deed of the 27th September, 1877, has preference over the previous mortgage-bond of the 20th August, 1875. We must, therefore, reverse the judgment of the Subordinate Judge on this point, and, with this decision, send back the case to him for disposal on the merits, costs to abide the result.

SPANKIE, J.—The ruling of the Subordinate Judge appears to be wrong. Under the provisions of s. 50, Act III of 1877, the defendant's instrument, which is registered, would take effect as against the plaintiffs', which might have been, but was not registered under Act VIII of 1871. The defendant's instrument was executed after Act III of 1877 came into operation. The plaintiffs' deed was executed after the 1st day of July, 1871, and was not registered under Act VIII of 1871. It is therefore "unregistered" within the meaning of the explanation appended to s. 50 of the new Act III of 1877. The appeal on the part of the defendant was not decided by the lower appellate Court on the merits. I feel, therefore, the necessity of reversing the decision of the Subordinate Judge on the point of law and would remand the case to him for trial on the points regarding which the parties are at issue. Costs to abide the result of a new trial.

*Cause remanded.*

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

LACHMI NARAIN (PLAINTIFF) v. WILAYTI BEGAM AND OTHERS (DEFENDANTS).\*

*Gift—Illegal consideration—Immoral consideration.*

In the year 1876 *H* made a gift of certain immoveable property to *W*, who was his mistress but lived with him as his wife, "on condition of her continuing to be his wife and remaining obedient to him, her husband." *W* acquired possession of the property in virtue of the gift, and had held it for eight years, when a creditor of *H*, under a decree enforcing a debt created by *H* subsequently to the gift, sued, amongst other things, for a declaration that the gift was invalid, as it had been made for an illegal consideration, viz., the future immoral co-habitation of *W* with *H*. Held that, assuming that the consideration for the gift was illegal, in the absence of fraud, the gift could not be set aside so many years after *W* had acquired possession thereunder. *Ayerst v. Jenkins* (1) followed.

\* First Appeal, No. 9 of 1879, from a decree of Maulvi Maqsood Ali Khan, Subordinate Judge of Bareilly, dated the 13th September, 1879.

(1) L. R., 16 Eq. 275.

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1879  
August 27.

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BEGAM.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiff appealed from the decree of the Court of first instance dismissing his suit.

Mr. Conlan, the *Junior Government Pleader* (Babu Dwarka Nath Banarji), Pandit Bishambhar Nath, and Mir Zahur Husain, for the appellant.

Messrs. Colvin, Ross, and Vansittart, Pandit Ajudhia Nath, and Shah Asad Ali, for the respondents.

The High Court (SPANKIE, J. and OLDFIELD, J.) delivered the following

JUDGMENT.—The plaintiff, Lachmi Narain, alleges that the defendant Captain W. Hearsey borrowed money from him on a bond dated 3rd February, 1873, and again other sums from 7th September, 1873, to 27th October, 1876, and a further sum on a bond dated 21st March, 1874. The plaintiff obtained decrees against him, and before judgment had attached certain properties, *i.e.*, mauza Kareli, mauza Bokhara, mauza Pahajganj, mauza Lissia Ghulam, and a share in mauza Kargina. The defendant Wilayti Begam, who is the mother of the other minor defendants, claimed these properties in her own right and that of her children, on the ground that they had been conferred on them by Captain Hearsey, and the properties were released. The relief sought by plaintiff is substantially to have declared the nature of the right of Captain Hearsey in the properties, that Wilayti Begam has no right in them, and that the other minor defendants have only a life-interest in them, and that the right and interest of Captain Hearsey in the property may be declared liable to sale in execution of the plaintiff's decrees. Wilayti Begam replied that these properties had been given to her and her children absolutely by Captain Hearsey, three years before the plaintiff became a creditor of Captain Hearsey, and that Captain Hearsey ceased to have any interest in them; and Captain Hearsey replied to the same effect. The Subordinate Judge has decided that there was a gift of the properties made by Captain Hearsey in consideration of love and affection for Wilayti Begam and his children, and that it was fully carried out by transfer of possession to them. There was no fraud on the plaintiff in the matter, for at the

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time Hearsey was in affluent circumstances, and the debt which he incurred to plaintiff was incurred after the gift had been made, and he finds that these properties were not hypothecated in the plaintiff's bonds, a fact the Subordinate Judge thinks affords an argument in favour of the fact that they had been already transferred to defendants, and that the transfer was known to the plaintiff, who otherwise, being well acquainted with Hearsey's affairs, would have insisted on their being pledged as security for the money he was lending. The Subordinate Judge finds that the gift was made to Wilayti Begam by Captain Hearsey, who regarded her as his wife, on condition of her continuing his wife, and to the children, on the condition of their adhering to the Christian religion, and he disallows the plea that since it is admitted Wilayti Begam was not his married wife, but only his mistress, the condition was really one for continuance of concubinage, and immoral, and the transfer null and void in consequence. On this point the Subordinate Judge remarks that: "Wilayti Begam is at least the mother of Mr. Hearsey's children, and lives with him as his wife: under these circumstances he made the gift of the property, having considered it his duty to support and provide for them, but as Wilayti Begam was of different religion and the children were minors, he introduced conditions calculated to to invalidate the title of the transferees in case of their deviation;" and farther on in his judgment he seems to consider that the gift having taken effect cannot be set aside at the instance of the plaintiff, and he dismissed the suit. The questions which we have to determine in appeal are (i) whether there was an actual gift which took effect and became operative by transfer of possession; (ii) its nature, what interest the transferees took under it, and whether anything remained to Captain Hearsey which can be taken in execution of plaintiff's decrees; (iii) whether the gift to Wilayti Begam can be set aside in this suit as illegal and immoral. (After determining that there was an actual gift which took effect and became operative by transfer of possession, and that in virtue of the gift the property vested absolutely in the donees, and no interest in the property remained to Hearsey, which could be sold in execution of a decree, the judgment continued :) Nor are we of opinion that the bequest to Wilayti Begam can be set aside by the plaintiff, and the property be taken in execution of his decrees, on the ground of ille-

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gality. It is quite true that she is not the married wife of Hearsey, and that their connection is open to the charge of immorality, but it is clear, in making this bequest to her, he regarded her in the light of a wife and the mother of his children, and it appears to us that the consideration he had in mind in making the gift may be held to have been rather her continuing to remain and discharge her duties to the children she had by him, than the continuance of their illicit intercourse, for it must be remembered he considered his state of health at the time to be precarious, and a personal object does not appear to have actuated him. The imputation of an immoral object is based solely on some words which appear in Hearsey's applications for mutation of names, *viz.*, the words, "on condition of her continuing to be my wife and remaining obedient to me, her husband," but there is nothing in these words by themselves to support the imputation, but it is sought to attach an immoral object to them on the ground, though she is referred to as his wife, she was his mistress, but when explained by all the circumstances the object implied in the words does not necessarily appear to have been such as is imputed. Nor should we be disposed to allow this plea, so as to rescind the bequest, and make the property available as Captain Hearsey's to satisfy plaintiff's claim, so many years after the donees had taken possession under the bequest. On this point we may refer to *Ayerst v. Jenkins* (1), as the principle on which that case was decided seems applicable here. It is not pretended, nor can it be shown, that the bequests were made in fraud of plaintiff. On the contrary there is evidence to show that at the time Captain Hearsey had a balance in plaintiff's hands of over a lakh of rupees, and the loans, the subject of this suit, were taken some years after the bequests had been made, and, as remarked by the Subordinate Judge, it is a significant fact that while other property was pledged for the loans, these properties were not, and as plaintiff was well aware of Captain Hearsey's affairs, the reason why the plaintiff did not insist on their being pledged may well be that he knew they had passed out of Captain Hearsey's hands. We have now disposed of all the material pleas in appeal, and there is no force in the last objection as to costs. We dismiss the appeal with costs.

(1) L. R., 16 Eq. 275.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spinkie.*

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September 1.

**ABLA KH RAI AND OTHERS (DEFENDANTS) v. SALIM AHMAU KHAN  
(PLAINTIFF) \***

*Suit for cancelment of lease—Breach of conditions involving forfeiture—Act XVIII of 1873 (N.-W. P. Rent Act), s. 93, cl. (c)*

The plaintiff, the representative in title of a lessor, sued under cl. (c), s. 93 of Act XVIII of 1873, for the cancelment of a lease, on three grounds, viz., on the ground that the lessees had paid the rent to the Collector, on account of the revenue due in respect of the estate, instead of to him; secondly, on the ground that they had failed to pay certain instalments of rent on the due dates; and thirdly, on the ground that they had planted trees and sunk wells, and allowed their tenants to do the same, without the lessor's consent; thereby committing breaches of the conditions of the lease involving its forfeiture. *Held*, on the construction of the lease, with reference to the first ground, that as the lease was intended to be perpetual, and as the rent had been paid to the Collector for many years under an arrangement effected between the parties to the lease and it was not shown that the plaintiff had repudiated this arrangement (even if he had the power of so doing) or demanded payment of the rent directly to himself, payment of rent by the lessees to the Collector did not amount to a breach of the conditions of the lease: with reference to the second ground, that the lease being intended to be perpetual, and no arrears of rent being due, irregularity and unpunctuality in the payment of the instalments of rent in question were not breaches of the conditions of the lease involving its forfeiture: and, with reference to the third ground, that the condition as to the planting of trees and sinking wells being merely a prohibition, and not a condition the breach of which involved the forfeiture of the lease, the lease could not be cancelled because the lessees had planted trees or sunk wells and allowed their tenants to do the same, without the lessor's consent.

*Held* also that, assuming that the lessor was entitled, on the third ground, to the cancelment of the lease, cancelment was not to be deemed the invariable penalty for the breach of such a condition as that mentioned in that ground. The Full Bench ruling in *Sheo Churun v. Bussunt Singh* (1) followed.

THIS was a suit, under cl. (c), s. 93 of Act XVIII of 1873, for the cancelment of a lease dated the 7th December, 1838. The material portion of this lease was as follows: "As the lessee has agreed to take a permanent lease of mauza Darsan from the beginning of 1246 fasli at an annual rent of Rs. 1,111 (*sicca*) and has executed a kabuliyat, therefore this lease is granted to him: he shall now hold possession as *mustajir* and shall consider the fulfilment of the following conditions to be the means of his continu-

\* Special Appeal, No. 1029 of 1877, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 8th August, 1877, affirming a decree of A. E. C. Casey, Esq., Assistant Collector of the first class, dated the 26th June, 1877.

(1) H. C. R., N.-W. P., 1871, p. 232.

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ing to be lessee : (i) he shall pay the rent annually, instalment by instalment, from the month of Kuar to the month of Baisakh, at the times fixed by the Government for the payment of instalments of revenue ; in case the rent is not so paid, all his property moveable and immoveable shall be sold, and the proceeds of such sale shall be deposited in the Government treasury towards satisfying any arrears : (ii) he shall not allow, without the lessor's permission, any one to plant trees, dig tanks, or sink wells, neither shall he himself do such things : as long as the lessee or his heirs shall continue to pay the rent annually, instalment by instalment, the lease shall remain in force, but if even one instalment falls into arrear the lease shall become null and void, and shall be cancelled". It appeared that for many years, by an arrangement between the parties to the lease, the lessee had paid the rent into the Government treasury on account of revenue instead of to the lessor. The plaintiff who had purchased, on the 20th November 1876, the rights and interests of the lessor, claimed in his plaint the cancelment of the lease on the ground that the defendants had failed to pay instalments of rent due severally on the 15th November, 1876, 15th January, 1877, and 1st May, 1877, on the due dates, and that they had allowed their tenants to plant trees and sink wells, and had themselves planted trees and sunk wells, without the lessor's permission. The Court of first instance held that, as the defendants had failed to pay the instalments of rent in question punctually, a breach of the conditions of the lease involving its forfeiture had taken place, and gave the plaintiff a decree cancelling the lease. On appeal by the defendants the lower appellate Court concurred in the decision of the Court of first instance and affirmed the decree of that Court.

The defendants appealed to the High Court, contending that the lease was intended to be a perpetual lease, and on a proper construction of its terms, a failure to pay an instalment of rent when due did not involve the forfeiture of the lease.

*Mr. Conlan and Lala Lalta Prasad, for the appellants.*

*Pandit Bishambhar Nath and Shah Asad Ali, for the respondent.*

The High Court (STUART, C. J. and SPANKIE, J.) remanded the case to the lower appellate Court for the trial of the issues stated in the following

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**ORDER OF REMAND.**—We are of opinion that the pleas in special appeal must be maintained. The lower appellate Court remarks that some years ago Nawal Kishore, representative of the deceased Babu Ram Ratan Singh, one of the original lessors in 1838 of the village in suit, fell into difficulties, and on the 20th November, 1876, his zamindari rights were sold at auction to the present plaintiff, respondent. The auction-purchaser found that the conditions of the lease, as regards the payment of rent, had not been complied with. He therefore sues to cancel the lease in accordance with the terms of the agreement recorded therein. The Judge considers that any private arrangement by which the lessees have been in the habit of paying the rent direct to the Government treasury, instead of to the lessor, has no bearing upon the case, and questions as to what might happen to respondent if appellant failed to pay his instalments. The question was whether or not appellant had by his failure caused a breach in the conditions of the lease. If the lessees paid direct to the Government treasury they should have paid before the instalment fell due, and this they had not done. He concludes that it has been proved that there has been a breach in fulfilment of the conditions as regards the regular and punctual payment of the instalments on the part of the lessees, and therefore the lease was liable to cancellation. He dismisses the appeal and affirms the decree of the first Court cancelling the lease. On examination of the lease we must hold from its terms that it was intended to be perpetual. The original lessors reserved no profits for themselves. The lessees were to pay as rent Rs. 1,111 *sicca* rupees. The Government demand was or is Rs. 1,103-5-2, and there is no satisfactory evidence to shew what became of the difference between these Rs. 1,111 and the equivalent in Queen's coin, Rs. 1,180-7-0, after payment of the Government revenue. According to the terms of the lease, the Rs. 1,111 Moorshedabad rupees were to be paid to the lessor. The first condition as to payment of rent is that it is to be paid, instalment by instalment, when the Government revenue is paid. In case of its non-payment all the property of the lessees, both moveable and immoveable, may be sold, and the proceeds applied to the liquidation of arrears. The second and fourth conditions impose upon the lessees all the responsibilities and duties of a full



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proprietor and declare that the lessors have no concern with the yearly rent as specified above. The lessees are to pay for roads, dák and police expenses, and patwáris' fees. The final condition is that the lease shall be held valid as long as the lessees shall pay the lessors regularly at every instalment the rent of the estate. If even a single instalment in any way falls into arrears the lease shall be deemed null and void and shall be cancelled, the lessors having the right of making other arrangements with any one, as they pleased. It is not denied that, for convenience's sake or for some other reason, the lessor and lessees in times past arranged that the rent should be paid direct to the Collector, and not to the lessor, and the lease has now held good from 1838 to May, 1877, when the suit was instituted, a period of nearly 39 years. It is not shown that the plaintiff, after his auction-purchase in 1876, repudiated this arrangement, even if he had the power of doing so, or demanded the payment of rent directly to himself. We are not therefore disposed to hold that, in paying the rent to the Government treasury, there was any breach of the conditions of the lease that would entitle the plaintiff to claim its forfeiture. The money paid to and received by the Collector in accordance with the custom of past years must be regarded as money paid on account of the lessor and for him. We have seen that in addition to the alleged breach of conditions in paying directly to the Government treasury, the Judge finds that the payments have been made with irregularity and want of punctuality. This may be the case, but we do not see in the lease itself any provisions which would justify the forfeiture of the lease on this account. Looking at the wording of the first condition, we should hold that a suit for rent was contemplated in the first instance on the failure to pay with regularity, and a decree to bring to sale the moveable and immoveable property of the lessees in satisfaction of any arrears. We are disposed to regard the last condition as a provisional clause for the security of regular payments, but not as one intended to enable the lessor to take advantage of any remediable lapse on the part of the lessees to pay their rent, and we think that the fact that the lease has held good for 39 years, and that its terms have been, in the matter of payment to the lessor, modified is a proof that the lease was perpetual and not to be cancelled at all as long as the rent was paid. It is worthy

of note that there are other conditions in the lease not affecting the question of the payment of rent which has been raised in this suit, and which appear to be framed with the view of maintaining some evidence of the lessor's proprietary rights, though the lease was intended to be perpetual. It seems to us that the suit in so far as it has been brought to cancel the lease because the rent was not paid to the representative of the lessor, but to the Government, must fail, for the reasons assigned, and that it must also fail as brought on the ground taken by the Judge, irregularity in payment and want of punctuality, there being no proof of any existing arrears.

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But there are allegations in the plaint which neither of the Courts below have taken notice of in their judgments. The plaintiff states that the lease is liable to cancelment because the lessees have allowed others to plant trees, and have themselves dug, and caused others to dig, wells on the land, and their doing so is an infringement of the lease. We have no judgment of the Court below on these allegations; doubtless the plaintiff is entitled to a judgment on them. Before we decide the appeal we must remand the case, under s. 354, Act VIII of 1859, to the lower appellate Court to determine whether or not the lessees have allowed others to plant trees, and have themselves done so, without the permission of the lessor; whether they have allowed others to dig wells, and have done so themselves, without the permission of the lessor; and though doubtless we ourselves might determine the point, we direct the lower appellate Court to say whether, in the event of it being shown that the lessees have exercised these proprietary rights, they have thereby incurred the forfeiture of their lease.

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The lower appellate Court found that the lessees had planted trees and sunk wells, and allowed their tenants to do so, without the permission of the lessors, thus breaking the conditions of the lease, and that such breach of the conditions of the lease involved, under the terms thereof, its forfeiture. On the return of this finding the High Court delivered its judgment, the material portion of which was as follows :

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**JUDGMENT.**—The main point on which the plaintiff relied was default in the payment of revenue, according to the Government instalments, the cause of action accruing on the 16th November, 1876, 16th January, and 2nd May, 1877. At the end of the plaint, and as it were an after-thought, it is stated that the lease is also liable to forfeiture because the lessees have dug wells and caused wells to be dug by others, but no instances are specified and no detail given. (After determining that the lessor had acquiesced in the construction of wells and gardens by the lessees and their tenants, the judgment continued :) We have already disposed of that portion of the appeal which relates to the alleged unpunctuality in payment of the revenue. We have held that there is nothing in the lease to justify forfeiture of the lease in regard to the mode in which the revenue was paid, or the regularity or irregularity with which it was paid. In payment of the revenue the lessees followed an arrangement between the lessor and themselves which held good from 1838 to 1877, and we also held that there was no proof that after the purchase the plaintiff repudiated the arrangement; we also held that the lease would not justify forfeiture on the ground of any irregularity in the punctual payment of rent; our reasons are given in our judgment of the 13th February of this year; they need not be repeated here. We now hold regarding the issue remanded to the Judge that the sixth clause of the lease contains no provision that, if the lessees should build wells without the consent of the lessor, they should be liable to forfeiture of the lease. There is no such condition in this clause; on the contrary the concluding part of it provides that as long as the said leaseholders or their heirs shall continue to pay the Government revenue annually, instalment by instalment, the lease shall remain in force, but if they fall into arrears for a pice even the lease shall become null and void, and the lease shall be cancelled. It is clear that the lease contemplates as the main condition that there shall be no default in payment of the Government revenue, there is nothing more than a prohibition regarding wells and planting trees. Even where the right of the zamindar to claim forfeiture in such a case is proved, according to a Full Bench ruling in *Sheo Churun v. Bussunt Singh* (1) forfeiture is not to be

(1) H. C. R., N.-W. P., 1871, p. 282.

deemed the invariable penalty for breach of contract occasioned by the construction of a well or improvement of a tenant's holding. With this view of the case we decree the appeal and reverse the judgment of the Court below with costs, thus dismissing the suit as brought.

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*Appeal allowed.*

*Before Mr. Justice Spankie and Mr. Justice Straight.*

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SHIB DAT (JUDGMENT-DEBTOR) v. KALKA PRASAD (DECREE-HOLDER)\*

*Decree for money payable by Instalments—Execution of Decree—Act XV of 1877 (Limitation Act), s. 19—Acknowledgment—Limitation.*

*Held*, in the case of a decree for money payable by instalments, with a proviso that in the event of default the decree should be executed for the whole amount, that the decree-holder was strictly bound by the terms of the decree, and not having applied for execution within three years from the date of the first default, the decree was barred.

*Held* also, the judgment-debtor having, three years after the first default, acknowledged in writing his liability under the decree, and signed such acknowledgment, that the decree being already barred, such acknowledgment did not create a new period of limitation.

THE decree in this case was dated the 14th July, 1873, and directed the payment of Rs. 700, together with interest at twelve annas per cent., in instalments, the first instalment being Rs. 200 payable in Pus 1281 fasli (5th December, 1873—2nd January, 1874), the second being the same amount payable in Pus 1282 fasli (24th December, 1874—21st January, 1875), and the third being Rs. 300 payable in Asarh 1282 fasli (20th June, 1875—18th July, 1875). The decree further directed as follows:—"In the event of default the decree shall be executed for the whole amount." On the 4th January, 1875, the first instalment having become due on the 2nd January, 1874, the judgment-debtor paid Rs. 200. On the 22nd January, 1875, or after the date that the second instalment became due, he paid Rs. 150. On the 11th July, 1876, or after the date the third instalment became due, he paid Rs. 100. On the 6th November, 1876, he paid Rs. 300. On the 28th June, 1877, he acknowledged in writing on the decree that up to that date a balance of Rs. 124-1-0 was due thereunder, and signed this

\* Second Appeal, No 63 of 1879, from an order of W. Tyrrell, Esq., Judge of Bareilly, dated the 4th April, 1879, reversing an order of Muhammad Nizam Ali Khan, Munsif of Filibhit, dated the 20th December, 1873.

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acknowledgment On the 27th November, 1878, the decree-holder applied for execution of the decree. The Court of first instance held that the application was barred by limitation, being of opinion that it should have been made within three years from the date the first instalment fell due and was not paid. On appeal by the decree-holder the lower appellate Court held that, under s. 19 of Act XV of 1877, the acknowledgment by the judgment-debtor of his liability under the decree created a fresh period of limitation, and allowed the application.

The judgment-debtor appealed to the High Court.

Mr. *Chatterji*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

The following judgments were delivered :

SPANKIE, J.—In my opinion the decree-holder was bound strictly by the terms of the decree. When the first default occurred, under the wording of the decree, he was bound to execute it in one lump. The instalment arrangement then ceased. If the decree holder chose to continue to receive instalments, he did so at his own risk. When the acknowledgment of the balance due was made, it seems to me that the decree was already dead, and could no longer be executed. Though the cases cited (1) may not be strictly in point, the principal upon which they proceed applies to this case. I would decree the appeal and reverse the order of the Court below with costs.

STRAIGHT, J.—I entirely agree in the views of my colleague Mr. Justice Spankie.

*Appeal allowed.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Straight.*

EMPRESS OF INDIA v. GANRAJ AND OTHERS.

*Confession made by one of several persons being tried jointly for the same offence—  
Act I of 1872 (Evidence Act), s. 30.*

Where the confession of a person being tried jointly with other persons did not implicate him to the same extent as it implicated such other persons, and was not

(1) *Kristo Komal Singh v. Huree Lal Mookherji v. Roy Dhampat Singh*, 24 *Sardar*, 13 W. R., F. B., 44 : and *Hira* W. R. 282.

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September 4.

sufficient of itself to justify his conviction, held that such confession could not be taken into consideration, under s. 30 of Act I of 1872, against such other persons. *Queen v. Belat Ali* (1) followed.

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This was an appeal against convictions by Mr. J. W. Power, Session Judge of Ghazipur, dated the 21st June, 1879. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Colvin, for the appellants.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown.

STRAIGHT, J.—This is an appeal by four persons (i) Ganraj, (ii) Basraj, (iii) Jhamman, (iv) Sittu, who were jointly tried and convicted, together with a man named Samaru, at the Ghazipur Sessions Court on the 21st June last, for attempting to break into a dwelling house. It appears that upon the night of the 22nd April of the present years two chaukidars, by name Palak Singh and Musafir Singh, were going their rounds in the town of Zamaniah, about 11 o'clock, when they suddenly lighted on some eight or ten persons apparently engaged in endeavouring to effect an entrance into the house of one Malik Chand by breaking a hole through the wall. These officers at once made efforts to arrest the culprits, calling loudly for assistance the while, but the numbers against them were too great and after a fight and several blows being exchanged the offenders escaped. About dawn of the 23rd April, however, Samaru was caught close to the scene of the attempted crime, and very soon after his being taken into custody he made a statement. On the 28th the charge against him alone was gone into before Mr. Wheeler, the Magistrate, and in his presence Samaru appears to have given two further accounts of the transactions. The result of these was that on the adjournment day the four appellants were placed in the dock with him, and at the conclusion of the proceedings the case was transferred to the Court of Mr. Rustomji. Further inquiry took place on the 6th May, and then all five defendants were committed. Upon the hearing of the appeal it was urged by Mr. Colvin for

(1) 10 B. B. L. 453, S. C., 19 W. R. 67; see also the other cases cited in the second paragraph of note (2) to the case of *Empress v. Bhawani*, I. L. B.,

1 All. 664. See, however, *Queen v. Bakur Khan*, H. C. R., N.-W. P., 1873, p. 213.

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the four appellants : (i) that the evidence of their identity as parties to the attempted crime was unsatisfactory, and that Palak Singh and Musafir Singh were untrustworthy witnesses : (ii) that each and all the confessions made by Samaru were inadmissible under s. 30 of the Evidence Act against his co-prisoners, because the statements contained in them did not admit his own participation in the crime, but on the contrary were obviously made to show that he was no *party* to it.

It will be as well to dispose of the last contention first. In order to do so I have very carefully examined each of the statements, five in all, made by Samaru. I need not point out their variations or discrepancies one from the other : even were they admissible I should not think of acting upon them for a moment. But I am clearly of opinion that none of them satisfy the requirements of s. 30, and that they are not *confessions* in the sense of that section. The charge upon which Ganraj, Busraj, Jhamman, and Sittu were tried in the Sessions Court was one of attempted house-breaking, and unless Samaru's statements went the length of admitting that he was at the spot approving of and coinciding in, in fact in other words, that he was a principal in, the commission of the unlawful act upon which the others were engaged, I do not think that such statements should "be taken into consideration." In every one of them he seeks to fix guilt on the others, and to excuse himself, and I do not, therefore, think these so-called confessions "implicate him to the same extent as they implicate the persons against whom they are proposed to be used,"—*Queen v. Belat Ali* (1) As I pointed out at the hearing of the appeal, it seems to me that the test s. 30 of the Evidence Act intended should be applied to a statement of one prisoner proposed to be used in evidence against another, is to see whether it is sufficient by itself to justify the conviction of the person making it *of the offence* for which he is being jointly tried with the other person or persons against whom it is tendered. In fact to use a popular and well understood phrase the confessing prisoner must tar himself and the person or persons he implicates with one and the same brush. I therefore think that

(1) 10 B. B. L. 452, S. C., 19 W. R. 67 ; see also the other cases cited in the second paragraph of note (2) to the case of *Empress v. Bhawani*, I. L. R.,

1 All. 664. See, however, *Queen v. Bakur Khan*, H. C. R., N.-W. P., 1873, p. 213.

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Mr. Colvin's objection to Samaru's statements is a valid one, and they should not have been taken into consideration in the Sessions Court. I have however come to the conclusion after a very close and careful examination of all the proceedings that, in the terms of s. 167 of the Evidence Act, there was sufficient evidence, without Samaru's statements, to justify the conviction of all the appellants, and I accordingly dismiss the appeal, at the same time observing that I do not think they were prejudiced in their defences by the admission in evidence of those statements. I see no ground for interfering with the punishment. The accused were convicted of a very serious offence, which they followed up by violence to the officers of the law, and I think the Sessions Judge very properly proportioned the punishment.

*Appeal dismissed.*

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## CRIMINAL JURISDICTION.

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 1879  
September 5.
 

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*Before Mr. Justice Straight.*

EMPRESS OF INDIA *v.* KASHI.

*Act X of 1872 (Criminal Procedure Code), s. 215—Examination of witnesses named for the prosecution—Discharge of accused without examining all the witnesses.*

Before a Magistrate discharges an accused person under s. 215 of Act X of 1872, he is bound, under that section, to examine all the witnesses named for the prosecution. *Empress v. Himatulla* (1) followed.

THIS was a case reported to the High Court by Mr. R. G. Currie, Sessions Judge of Gorakhpur, for its orders. One Kashi, who had been accused of an offence under s. 211 of the Indian Penal Code, had been discharged by Mr. J. H. Carter, the Magistrate trying him, without the evidence of all the witnesses named for the prosecution being taken. In reporting the case the Sessions Judge suggested that the order of discharge should be allowed to stand, as it did not appear that there had been any miscarriage of justice or material error sufficiently requiring the re-trial of the accused.

STRAIGHT, J.—I regret that I feel myself prevented by the terms of s. 215, Criminal Procedure Code, from adopting the suggestion

(1) I. L. R. 3 Calc. 389.



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of the Sessions Judge. The words of the explanation are plain and positive, and establish as a condition precedent to a discharge, the examination of all the witnesses named. It is impossible for me to say whether Mr. Carter was right or wrong in the view he took of the case, but he was clearly in error in determining it without satisfying the directions of s. 215. This point has already been made the matter of decision twice in this Court in the cases of *Empress v. Tantia* (1) and *Empress v. Bohdram* (2) decided 28th July, 1879. In both of those I followed the authority of *Empress v. Himat-ulla* (3) with which I may add I entirely agree. I must therefore set aside Mr. Carter's order of discharge, and direct him to reopen the case and examine the further witnesses named, and then pass such order in the matter, as the whole of the evidence may appear to call for.

Before Mr. Justice Straight.

1879  
September 6.

IN THE MATTER OF THE PETITION OF SUKHO v. DURGA PRASAD AND OTHERS.

*High Court, Powers of Revision—Act X of 1872 (Criminal Procedure Code), ss. 272, 297—Power of private prosecutor to move the Court in a case of acquittal.*

A private prosecutor can move the High Court, in the case of an acquittal, to exercise its powers of revision under s. 297 of Act X of 1872 (4).

THIS was an application by one Sukho for the revision of a judgment of acquittal by Mr. W. Tyrrell, Sessions Judge of Bareilly, dated the 21st February, 1879.

Babu Jogindro Nath Chaudhri, for the petitioner.

Mr. Leach, for the opposite parties.

STRAIGHT, J. —This was an application by petition on the part of one Sukho for revision of an order passed by the Sessions Judge of Bareilly, acquitting four persons prosecuted in his Court by the applicant. At the commencement of the proceedings before me objection was taken by Mr. Leach for the parties whose acquittals are complained of to the "*locus standi*" of Babu Jogindro Nath, to make such an application on the part of a private prosecutor, s. 272 of the Criminal Procedure Code giving the Local Government alone the

(1) Legal Remembrancer, N.-W. P. vol. i, 11.

(2) Unreported.

(3) I. L. R., 3 Cal. 389.

(4) See *In the matter of Hardeo*, I. L. R., 1 All, 139, in which case Stuart, C. J. and Turner, J., express opinions to the same effect.

right to move against a judgment of acquittal. I was, however, of opinion that this being an application for revision, it was competent for a private prosecutor to bring to the knowledge of this Court material errors that had taken place in a judicial proceeding in a Court subordinate to it, with a view to having them set right. The circumstance that an acquittal had taken place in the Court below did not appear to me to affect the consideration of the objection, the whole question appearing to me to be whether the applicant's petition showed upon the face of it material error in law or procedure in the proceedings of the Sessions Court. I have carefully examined it, and find it deals purely with questions of fact, and that no point of law is raised upon it, consequently there is nothing to revise and the record may be returned. Properly I ought to have rejected the former application to send for the record.

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## APPELLATE CIVIL.

 1879  
November 17.
 

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*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

BHUPAL (DEFENDANT) v. JAG RAM (PLAINTIFF.)\*

*Condition against alienation—Mortgage.*

*Held* that where a person stipulates generally not to alienate his property he does not thereby create a charge on any particular property belonging to him (1).

THE plaintiff in this suit obtained a decree for Rs. 72 in a Court of Small Causes on the 16th July, 1870. He applied for the execution of this decree against his judgment-debtor, who on the 19th December, 1871, preferred a petition to the Court executing the decree in which, after promising to pay the judgment-debt, and also another judgment-debt, in instalments, he promised as follows: "I shall not alienate my own property or my father's until the amount of both decrees has been paid: if I do so I will first pay the amount of the decrees." In contravention of this promise he sold his property in a certain village to one Bhupal. The plaintiff now sued Bhupal

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\* Second Appeal, No. 370 of 1879, from a decree of H. G. Keene, Esq., Judge of Agra, dated the 14th December, 1878, modifying a decree of Sayyid Munir-ud-din Ahmad, Munsif of Jalesar, dated the 20th September, 1878.

(1) For other cases in which it was held that a mere covenant not to alienate does not amount to a mortgage, see *Gunoo Singh v. Latafut Hossain*, 1. L.

R., 3 Calc. 336; *Ram Buxh v. Sookh Deo*, H. C. R., N. W. P., 1869, p. 65; *Chonnee Lall v. Puhulwan Singh*, H. C. R., N. W. P., 1868, p. 270.

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to establish his right to recover Rs. 181, the amount of the decrees, by the sale of this property. The Court of first instance gave the plaintiff a decree, and on appeal by the defendant the lower appellate Court affirmed this decree.

The defendant appealed to the High Court.

The *Senior Government Pleader* (Lala Juala Prasad), for the appellant.

Mr. *Chatterji*, for the respondent.

The following judgments were delivered by the Court :

STUART, C. J.—In this case one Jawahir, in the course of execution of a Small Cause Court decree against him at the suit of the plaintiff, had by a petition in the execution department dated the 19th December, 1871, agreed to pay the debt by yearly instalments, and the petition then proceeds as follows : “In case of default I shall pay the amount of both the decrees in a lump sum : I shall not alienate my own property and that of my father until the amount of both the decrees has been paid : if I do so I shall first pay the amount of the decrees : the first instalment shall fall due in the month of Baisakh, Sambat 1929.” It is contended that this has the effect of constituting a valid lien by hypothecation in favour of the plaintiff, and that therefore a subsequent sale to Bhupal the defendant was invalid. But such a contention cannot be allowed. The agreement contained in the petition is not evidence of any hypothecation, not even of a verbal one, but simply an arrangement that the property should not be alienated till the debt was paid. In fact such an agreement goes to disprove that any mortgage or hypothecation was made, or even intended by it, for the very fact of an undertaking “not to alienate” shows that neither the property itself nor any interest in it had actually passed to the plaintiff, which, if there had been a good and valid hypothecation, must have occurred. The sale therefore to the defendant, appellant, cannot be impugned. The present appeal must be allowed, the decrees of both the lower Courts are reversed and the suit dismissed with costs in all the Courts.

OLDFIELD, J.—It appears that the plaintiff obtained a decree in the Small Cause Court against his judgment-debtor for a sum of

money, and in course of execution of it the judgment-debtor entered into an arrangement to pay the amount by instalments, and stipulated that he would not alienate his property until the amount was satisfied. He, however, made an alienation by private sale to the defendant, appellant before us, and the plaintiff has brought this suit to have the property resold, on the ground that it had been hypothecated to him by the arrangement entered into the execution proceedings above referred to. The Courts below have decreed the claim. The appeal on the part of defendant however must prevail, since on examination of the proceedings on which plaintiff relies, it cannot be held that the judgment-debtor made any pledge of any particular property to the plaintiff, for a mere stipulation not to alienate his property generally cannot be taken to effect a mortgage of property as security for a debt. The appeal is decreed and the decrees of the Courts below reversed and the suit dismissed with all costs.

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*Appeal allowed.*

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## FULL BENCH.

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*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.*

UMRAO BEGAM (JUDGMENT-DEBTOR) v. THE LAND MORTGAGE BANK  
OF INDIA (DECREE-HOLDER).\*

*Act XVIII of 1873 (N.-W. P. Rent Act), ss. 9, 171—Land-holder—Right of Occupancy tenant—Transfer of Right of Occupancy in Execution of Decree.*

*Held* (SPANKIE, J., dissenting), affirming the decision of a Division Bench of the High Court in this case (1), that s. 9 of Act XVIII of 1873 does not prevent a land-holder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself.

In this case an application for the review of a judgment passed by a Division Bench of the High Court on the 2nd January, 1878 (1), having been granted by the learned Judges of that Bench (Pearson, J. and Oldfield, J.), those Judges referred to the Full Bench the question whether the view taken in that judgment, viz., that s. 9 of Act XVIII of 1873 was enacted in the interest of the

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\* Application for Review of Judgment, No. 2 of 1878.

(1) Reported at p. 547 of Volume I. of these Reports.

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landlord and was not intended to bar a sale made with the landlord's consent, was correct or not. The grounds on which the review was sought were (i) that the judgment was opposed to the express provisions of that section, which declared the holding of the tenant to be transferable among the co-sharers only, and (ii) that the judgment was opposed to the spirit, and defeated the object, of the law relating to tenants having a right of occupancy.

The *Senior Government Pleader* (Lala Juala Prasad), for the appellant.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the respondent.

The following judgments were delivered by the Full Bench :

STUART, C. J.—This is a reference to the Full Bench of the Court by a Division Bench (Pearson, J., and Oldfield, J.) to whom an application for a review of judgment had been presented. The Division Bench had held that s. 9 of the Rent Act XVIII of 1873 did not prevent a zamindar, who was the holder of a decree against a tenant with a right of occupancy, from attaching and selling in execution of his decree his judgment-debtor's occupancy-right. In the course of the hearing before the Division Bench, a Full Bench ruling of this Court in the case of *Ablakh Rai v. Udit Narain Rai* (1) was referred to. In that Full Bench case it was held by a majority that the right of an occupancy-tenant was only transferable by sale in execution of a decree, where the decree-holder was a co-sharer by inheritance in such right. I agreed with the majority so far, but I went further and held, and still hold, that the right to enforce legal process by execution of any decree against such property *quantum valeat* cannot under any circumstances be taken away unless by express words to that effect, and I referred to s. 171 of the Rent Act to which the attention of the Full Bench had been directed as strengthening my view of the meaning and application of s. 9. Under these circumstances I could not dissent from the judgment of the Division Bench in the present case, for, in my opinion, s. 9 read in connection with s. 171 allows the transfer of property by the execution of a decree against the tenant in the hands of any

(1) I. L. R., 1 All. 353.

decree-holder. Nor in so expounding the law do I consider that I am legislating by arbitrarily adding to its body. On the contrary I am simply giving effect to the rights of suitors with decrees in their hands against such a class of judgment-debtors, and which decrees in my view can be executed against any property or right and interest in property which his debtor may have, and for what it may be worth. I would therefore refuse the present application for a review on the grounds assigned and affirm the ruling of the Division Bench.

I may here observe that the report of my judgment in that Full Bench case is not quite correct in one particular. I am there made to say that "I consider that the words, 'or otherwise' must be understood to be a general expression controlling the particular words which go before." It should have been "controlled by the particular words which go before".

PEARSON, J.—It is intelligible that it was the intention of s. 9, Act XVIII of 1873, to empower occupancy-tenants to transfer their rights to co-sharers by inheritance in such rights without the consent of the land-owner. But it is difficult to understand that it was intended to prohibit absolutely a transfer of such rights by such tenants to any person to whom the land-owner was willing that such transfer should be made. A land-owner can oust a defaulting tenant in execution of a decree for arrears of rent and make over the holding to another person. Why should not a transfer of the holding be arranged and effected between the defaulter and another person with the land-owner's consent? In such a transaction there appears no moral turpitude or political evil such as to warrant the Legislature in forbidding and repudiating it as essentially bad and declaring it to be null and void in law. On the contrary, such a transaction appears to be of an innocent, unobjectionable and convenient nature, and incapable of harming any body. It seems also, as the judgment which it is sought to review observed, unreasonable to hold that a land-owner should not be at liberty to cause the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself, if he be willing to accept the auction-purchaser as a tenant. Although the terms of s. 9 are not qualified by any reference to the consent of the land-owner, we are yet bound to construe them in such a reasonable

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manner as to avoid absurd conclusions. I therefore adhere to the view expressed in the judgment of the 2nd January, 1878.

SPANKIE, J.—We must, I think, accept the strict terms of s. 9 of the Rent Act. The rights of tenants at fixed rates are heritable and transferable. But no other right of occupancy shall be transferable by grant, will or *otherwise*, except as between persons who have become by inheritance co-sharers in such right. It seems to me that to allow sales, provided that the landlord consents to them, would be law-making on the part of this Court. We should practically add to the section a proviso which the framers of the law and the Legislature might have introduced, when the Act was passed, had they been so minded. I would therefore say that s. 9 bars a sale made with the consent of the zamindar, which, without reference to his consent, is prohibited by the terms of the section, except as between persons who have become by inheritance co-sharers in the right, the subject of the sale.

OLDFIELD, J.—The question raised in this case is whether the sale in execution of a decree of a Civil Court of the rights and interests of a tenant having rights of occupancy made at the instance of his landlord, who has obtained a decree against him, is valid so as to convey any rights or interest to the purchaser. S. 9 of Act XVIII of 1873 is relied on to show that such a sale is invalid. That section is as follows: "The rights of tenants at fixed rates shall be heritable and transferable: no other right of occupancy shall be transferable by grant; will or otherwise except as between persons who have become by inheritance co-sharers in such right." If this section is to be taken to mean that a landlord may not bring to sale his tenant's rights in his holding in execution of a decree of a Civil Court obtained against him, it can only be by interpreting this section as absolutely and without qualification forbidding and rendering void all transfers outside the limitation prescribed under whatever circumstances they have been made, whether with the consent of the landlord, the tenant, or of both, and if so, such a transfer will necessarily be void although made with the consent of both landlord and tenant. It seems to me impossible to suppose that this was the intention of the law. The object of this section was I apprehend to define the extent of a tenant's interest in his

holding as opposed to the landlord's, and to settle what had been a vexed question, how far a tenant has the power, without the consent of his landlord, to transfer his holding. The section refers to transfers made by the tenant independently of the landlord, and it was not intended to disallow transfers when made with the consent of the landlord, or at his instance, as in the case before us, in execution of a decree of the Civil Court, when there is otherwise nothing in the law forbidding a tenant's rights to be sold in execution of such a decree. It will be seen that the effect of s. 9, Act XVIII of 1873, is to give a larger property in their holdings to tenants at fixed rates than it gives to the tenants with rights of occupancy, and a larger property to the latter than it gives to mere tenants-at-will. The first class can transfer their holdings at their own pleasure, and the second class can only do so under limitations. This distinction between the different powers of transfer in different classes of tenants is intelligible only when we ascribe it to the desire to protect the landlord against transfers at the will and pleasure of his tenants. It is certain that the Rent Act does not extend to the tenants any absolute right to be maintained in their holdings against their landlords. Tenants with rights of occupancy are not protected against being ejected from their holdings by their landlords in execution of decrees for arrears of rent obtained against them by their landlords, and it would appear that the landlord might, if so disposed, bring to sale his tenant's interest in his holding in execution of a decree for rent, under s. 171 and following sections of Act XVIII of 1873. I see no reason to suppose that it was the intention of s. 9, Act XVIII of 1873, to invalidate the sale in the case before us.

## APPELLATE CIVIL.

*Before Mr. Justice Spankie and Mr. Justice Straight.*

**BASANT RAI AND OTHERS (DEPENDANTS) v. KANAUI LAL (PLAINTIFF)\***  
*Unfructuary mortgage followed by sale—Revival of mortgage by cancellation of sale—Redemption of mortgage—Attachment in the execution of decree—Claim to attached property—Effect of order under Act VIII of 1859 (Civil Procedure Code), s. 246.*

Z mortgaged in 1859 certain immoveable property, being joint ancestral property, for a term of five years, giving the mortgagee possession of the mort-

\* Second Appeal, No 1365 of 1878, from a decree of R. S. Saunders, Esq., Judge of Farukhabad, dated the 13th November, 1878, affirming a decree of Pandit Harzahal, Subordinate Judge of Farukhabad, dated the 2nd September, 1878.

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gaged property. In 1861 *Z* sold this property to the mortgagee, whereupon the sons of *Z* sued their father and the mortgagee, purchaser, to have the sale set aside as invalid under Hindu law, and in August 1864 obtained a decree in the Sudder Court setting aside the sale. The mortgagee, purchaser, remained, however, in possession of the property as mortgagee. In May 1867, *Z* having sued the mortgagee for possession of the property on the ground that the sale had been set aside as invalid, the High Court held that *Z* could not be allowed to retain the purchase-money and to eject the mortgagee, purchaser, but must be held estopped from pleading that the sale was invalid. In November 1867, one *K* having caused the property to be attached and advertised for sale in the execution of a decree which he held against *Z* and his sons, the mortgagee objected to the sale of the property on the ground that *Z* and his sons had no saleable interest in the property. This objection was disallowed by the Court executing the decree, and the rights and interests of *Z* and his sons were sold in the execution of the decree, *K* purchasing them. In 1878 *K* sued, as the purchaser of the equity of redemption, for the redemption of the mortgage of 1859. Held that *K* was entitled to redeem the property. Held also that the mortgagee not having contested in a suit the order dismissing his objection to the sale of the property in execution of *K*'s decree, he could not deny that *K* had purchased the rights and interests remaining in the property to *Z* and his sons. Held also that the mortgagee had no lien on the property in respect of his purchase-money. Held also that, it being stipulated in the deed of mortgage that the mortgagee should pay the mortgagor a certain sum annually as "*malikana*" and the mortgagee not having paid such allowance since the date of the sale, the plaintiff was entitled to a deduction from the mortgage-money of the sum to which such allowance amounted.

On the 17th June, 1859, one Zalim Singh mortgaged a ten biswas share in a certain village to Basant Rai and certain other persons for Rs. 2,200, for a term of five years, giving the mortgagees possession of the share. On the 21st May, 1861, Zalim Singh executed a deed of sale of the share in favour of the mortgagees. The sons of Zalim Singh sued their father and the mortgagees, purchasers, to set aside this sale as being invalid under Hindu law, it having been made without their consent and to meet liabilities created through the personal extravagance of Zalim Singh. On the 1st March, 1864, the Court of first instance gave the sons of Zalim Singh a decree setting aside the sale on the ground that it had not been made for legitimate family purposes, but for the gratification of the vendee's personal extravagances. This decree was affirmed by the Sudder Court on appeal by the mortgagees, purchasers, on the 22nd August, 1864. The mortgagees, purchasers, remain however in possession of the share as mortgagees. In 1866 Zalim Singh sued the mortgagees for the possession of the share on the ground that the sale had been set aside. On the 27th May, 1867, the High

Court held, on appeal by the mortgagees, that Zalim Singh could not be allowed to retain the purchase-money, and to eject the purchasers, but must be held estopped by his own act from pleading the invalidity of the sale. Subsequently one Kanauji Lal having applied for the sale of the share in the execution of a decree which he held against Zalim Singh and his sons, the mortgagees objected to the sale. On the 15th. November, 1867, their objection was disallowed. On the 20th November the share was sold in the execution of this decree, and was purchased by Kanauji Lal. Kanauji Lal brought the present suit in June 1878 for the redemption of the mortgage of the 17th June, 1859. The facts of the suit are sufficiently stated in the judgment of the High Court, to which the defendants appealed from the decree of the lower appellate Court affirming that of the Court of first instance in the plaintiff's favour.

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Mr. *Howard* and Munshi *Hanuman Prasad*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandits *Bishambar Nath* and *Nand Lal*, for the respondent.

The High Court (SPANKIE, J. and STRAIGHT, J.) delivered the following

JUDGMENT.—The plaintiff, respondent, is the auction-purchaser of the ten biswas zamindari share of Zalim Singh, the subject of dispute. He avers that the share was mortgaged on the 17th June, 1859, to the defendants for Rs. 2,200, and for a term of five years, and that on the 21st May, 1861, Zalim Singh executed a deed of sale of the property in favour of the mortgagees, giving them credit for Rs. 2,200, the mortgage-money, Rs. 250 in cash, and retaining Rs. 5,800 to be paid on account of debts to the plaintiff: Lalta Prasad and others, sons of Zalim Singh, sued to set aside the sale and succeeded in obtaining a final decree in their favour from the Sudder Dewany Adawlat, North-Western Provinces, on the 22nd August, 1864: the defendants, however, continued in possession of the share as mortgagees: there was a stipulation in the mortgage-deed that Zalim Singh was to receive Rs. 75 yearly as “*malikana*” or proprietary allowance: this sum the mortgagees deducted yearly from the principal sum advanced on the mortgage, leaving now a balance of Rs. 925 due to the mortgagees: the plaintiff claims to redeem the share of Zalim Singh on payment of Rs. 925 or such sum as the

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Court shall declare to be due. The defendants contend that the purchase of the interest of the sons of Zalim Singh by the plaintiff at auction gave him no right of suit: they had no right during their father's lifetime: Zalim Singh had admitted the sale to defendants and he had ineffectually endeavoured to recover possession of the share, but the High Court, North-Western Provinces, on the 27th May, 1867, rejected his claim: the plaintiff's suit to redeem the mortgage on the ground that the sale of the 21st May, 1861, was invalid was barred by s. 13, Act X of 1877, and the admission of Zalim Singh. They also contend that they were entitled to repayment of the sale consideration and that the allowance of Rs. 75 ceased from the date of the sale, and that there was no condition in the mortgage-deed for the deduction of this sum yearly from the principal sum advanced on mortgage: Zalim Singh himself realized this sum prior to the sale. The Subordinate Judge held that the defendants, who objected to the sale of the share in execution of decree and against whose objection an order was passed on the 15th November, 1867, ought to have contested that order in a regular suit within the period prescribed by law: they had not done so, and the order became final, and they could not now contend that Zalim Singh had no rights that could be sold: the plaintiff therefore had a clear right of suit. He also held that the property in dispute could not be considered liable for the consideration of the sale-deed, that deed having been set aside by the Sudder Dewany Adawlat in 1864: the defendants themselves have admitted all along that they were mortgagees: as they had failed to show that the proprietary allowance of Rs. 75 had been paid yearly, the sum should be deducted from the amount of the mortgage-loan. He accordingly gave a decree to plaintiff as claimed. The defendants appealed and repeat their original pleas. The Judge held that the mortgage of 1859, which had merged in the sale of 1861, revived when that sale was cancelled under the decision of the Sudder Dewany Adawlat of 1864: the sale was set aside because it was invalid under the Hindu law. He accepts the argument of the Subordinate Judge in regard to the finality of the order under s. 246, Act VIII of 1859, and he further holds that defendants were not entitled to any refund of Rs. 8,000, as sale-consideration, before redemption could be allowed: if they are entitled to that sum, they could only claim it from Zalim Singh

personally : they could not claim it from the plaintiff who had purchased the equity of redemption : the defendants had never brought a suit for the recovery of the money. The Judge also allowed the deduction of Rs. 75 yearly from the mortgage-loan as there was no proof that the allowance had been paid.

In second appeal the same pleas are urged. The decision of the Sudder Dewany Adawlat of the 22nd August affirmed that of the Judge, dated 1st March, which set aside the sale of 1861 as not having been made for legitimate family purposes but for the gratification of the personal extravagance of Zalim Singh. It was therefore invalid under the Hindu law. But though the sale was set aside, possession was not given to the plaintiffs, the sons of Zalim Singh. The defendants remained in possession as mortgagees. The sale having been declared altogether inoperative, and having been completely set aside, it cannot be said that the mortgage was extinguished by the execution of the sale-deed. The defendants were simply left in possession as mortgagees. The mortgage transaction has never been impugned, and the plaintiff as the representative of the original mortgagor has certainly a right to redeem the mortgage.

The Courts below appear to have rightly held that, as the defendants objected to the sale by auction of the rights of Zalim Singh and an order was passed against them on the 15th November, 1867, which they had never contested in a regular suit, they could not now deny that the plaintiff had purchased whatever rights still remained to Zalim Singh and his sons. In holding this to be the case the lower appellate Court has followed the ruling in *Badri Prasad v. Muhammad Yusuf* (1) of this Court in Full Bench.

The lower appellate Court has not, as urged by the appellants, misunderstood this Court's decision of the 27th May, 1867. That decision ruled that, although the sale by Zalim Singh was set aside, yet Zalim Singh (then plaintiff) could not equitably be allowed to retain the purchaser's money and to eject the purchaser from the property sold. He must be held estopped by his own act from pleading the invalidity of the sale. But this decision was passed as against Zalim Singh himself, who on the strength of the Sudder Dewany Adawlat's decision of the 22nd August was seeking to obtain possession of the property from the defendants. But it does not follow

(1) I. L. R., 1 All. 381.

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that the defendants have a lien on the property to the extent of the purchase-money. They are not in possession under the sale-deed, but were in possession as mortgagees, and as such have continued to be recorded in the Collector's books. The sale had already been declared invalid, when the plaintiff purchased Zalim Singh's rights at auction and acquired by his purchase the right of redeeming the mortgage. If the purchase-money had been received by Zalim Singh who is no longer alive, the purchasers might have sued to recover the purchase-money from him during his life, and might possibly in execution of their decree have proceeded against Zalim's rights and interest in the property. They did not adopt this course, though the sale was, as has been observed, completely set aside by the judgment of the Sudder Dewany Adawlat in 1864. Any claim to recover the money now would appear to be barred by time, and the defendants, mortgagees, can have no right now to make the property responsible for the repayment of the purchase-money on account of the sale in 1861, which was held to be altogether invalid, as against the plaintiff who has purchased the equity of redemption of the mortgage in 1859, and that too after the objections of these defendants had been overruled, and the order made against them on the 15th November, 1867, had become final.

The finding of the lower appellate Court regarding the Rs 75, "malikana," is one of fact, with which we cannot interfere. The Judge in deducting this yearly allowance from the principal of the mortgage-loan has not acted contrary to law, and the plea that he should not have done so, because the term of the mortgage had expired, has no force, inasmuch as the mortgagees have continued to hold possession under the mortgage and as long as they do so are bound by its conditions. We dismiss the appeal and affirm the judgment with costs.

*Appeal dismissed.*

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July 25.

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

**KAMAL SINGH (PLAINTIFF) v. BATUL FATIMA (DEFENDANT)\***

*Trust—Assignment by Trustees—Limitation.*

In 1840 the purchasers and recorded proprietors of a four biswas share of a certain village caused a statement to be recorded in the village record-of-rights

\* Second Appeal, No. 266 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 19th December, 1878, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 4th March, 1878.

to the effect that *B* claimed to be the proprietor of a moiety of such share, and that they were willing to admit his right whenever he paid them a moiety of the sum which they had paid in respect of the arrears of revenue due on such share. In 1843 *M* purchased such share and became its recorded proprietor. In 1877 *K*, the son of *B*, sued the representative of *M*, for possession of a moiety of such share, alleging, with reference to the statement recorded in the record-of-rights, that such moiety had vested in *M*'s assignors in trust to surrender it to *B* or his heirs on payment of a moiety of the sum they had paid on account of revenue, and paying into court a moiety of such sum. Held that that statement could not be regarded as evidence of the alleged trust, and that, assuming that the alleged trust existed, the suit was barred by limitation, *M* having purchased without notice of the trust and for valuable consideration.

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In 1838 one Kesri Singh was the recorded proprietor of a four biswas share in a certain village. In 1839 Kesri Singh's rights and interests in this share were purchased by one Pitambar Singh at a sale in the execution of a decree held by him against Kesri Singh. On the 7th June, 1839, Pitambar Singh transferred his rights under this purchase by sale to one Ratan Singh and one Dirgpal Singh, who were recorded as the proprietors of the four biswas share, and paid the arrears of revenue due in respect of the share amounting to Rs. 108. In 1840, at the settlement of the village, Bal Singh, brother of Kesri Singh, having claimed to be the owner of a moiety of the four biswas share, Ratan Singh and Dirgpal Singh caused the following statement to be recorded in the village record-of-rights: "We Ratan Singh and Dirgpal Singh have purchased Kesri Singh's share: Bal Singh claims a moiety of it: he owes us Rs. 54 on account of the revenue we have paid: whenever he pays that amount with interest, he shall become the proprietor of his share." The four biswas share was then specified in manner following: "Our exclusive share (one moiety)": "on account of Bal Singh (one moiety)". On the 20th November, 1843, one Muzaffar Husain purchased the four biswas share from Ratan Singh and Dirgpal Singh, and became its recorded proprietor. In 1874, at the settlement of the village, Kamal Singh, the son of Bal Singh, who had meanwhile died, applied to the settlement officer to have his name recorded as the proprietor of a moiety of the four biswas share as his father's heir. The settlement officer refused this application. In April, 1877, Kamal Singh brought the present suit against Muzaffar Husain's widow for the possession of a moiety of the four biswas share, alleging, with

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reference to the statement which Ratan Singh and Dirgpal Singh had caused to be recorded in 1840 in the village record-of-rights, that a moiety of the four biswas share had vested in them and their assigns in trust to surrender it on payment of the sum, with interest, which they had paid on account of the revenue due in respect thereof. The plaintiff paid into court Rs. 54, and an equal sum on account of interest, or Rs. 108 in all. The defendant set up as a defence to the suit that the plaintiff's right was extinguished by length of time, because Ratan Singh and Dirgpal Singh were not trustees of the property when they assigned it to Muzaffar Husain, and because, assuming that they were trustees of it when they so assigned it, Muzaffar Husain had purchased it in good faith, without notice of the trust, and for valuable consideration. The Court of first instance held that Ratan Singh and Dirgpal Singh were trustees of the property, and that Muzaffar Husain had not purchased the property in good faith, as he had purchased without making any inquiry, and the suit was consequently not barred, and gave the plaintiff a decree. On appeal by the defendant the lower appellate Court, for reasons which will be found stated in the judgment of the High Court, dismissed the suit. The plaintiff appealed to the High Court.

Mr. *Niblett*, for the appellant.

Pandits *Ajudhia Nath* and *Nand Lal*, for the respondent.

The judgment of the Court (SPANKIE, J. and OLDFIELD, J.) was delivered by

SPANKIE, J.—The property in suit was recorded in the name of Kesri Singh, who fell into arrears in 1838 to the amount of Rs. 108. In 1839 Ratan Singh and Dirgpal Singh bought the rights and interests of Kesri Singh, and in 1840 they paid up the arrears of the entire share of four biswas. It is now alleged that Bal Singh, a brother of Kesri Singh, was also the owner of half the land, and the plaintiff relies upon an entry in the settlement record of 1840, which it is contended not only amounts to a recognition of Bal Singh's title by Ratan Singh and Dirgpal Singh, but shows that they continued to hold Bal Singh's share in trust, and plaintiff now seeks to pay the share of arrears due by Bal Singh and to take over the share. We are far from satisfied that

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the acknowledgment can be regarded as evidence of a trust as between Bal Singh and the original purchasers of Kesri Singh's rights. The entry is to the effect that a petition had been presented by Bal Singh claiming to be the owner of half of the four biswas in possession of Ratan Singh and Dirgpal Singh, and that the latter are willing to allow his share, when he pays the arrears due on it. We doubt whether these words are sufficient to raise a valid trust such as that which the plaintiff is endeavouring to set up. There is no undertaking on the part of Ratan Singh and Dirgpal Singh that they would continue to hold Bal Singh's share in trust for him and his heirs, over any extent of time, until some one of them was able to recover the land. In effect they did not do more than express their willingness, if Bal Singh chose to pay up his arrears, to give him up the land. Bal Singh might have availed himself of this opportunity but he never did. There does not appear to have been any promise to give up the land at any future time after long years of enjoyment of it to any other person than Bal Singh. If there was any agreement at all, it was a present one between the parties, but beyond the entry already referred to there is no sufficient evidence of any agreement, and Ratan Singh and Dirgpal Singh continued to be recorded as the owners of the entire four biswas. They were not the first purchasers of Kesri Singh's rights, which had been bought previously by one Pitambar Singh, and had been sold by him to Ratan Singh and Dirgpal Singh on the 7th June, 1839, and it was probably owing to this circumstance, and not caring to litigate the point whether Pitambar Singh had bought four or two biswas, when he purchased Kesri Singh's rights, they, who had paid up the arrears due to Government on the entire share, which was recorded in the name of Kesri Singh alone, were willing to release two biswas to Bal Singh, if he chose to discharge the arrears that would be payable by him. Beyond what has been stated there is nothing to show that the transaction had any of the characteristics of a trust. Pitambar Singh was put in possession of the share; Ratan Singh and Dirgpal Singh purchased it from him, and had to pay Rs. 108, Government arrears, on account of it, and certainly obtained possession of the four biswas as Kesri Singh's. They continued to hold them as owners, being recorded as such in the settlement record, until Dirgpal Singh



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died, and subsequently Ratan Singh and his brother Mardan Singh sold the four biswas on the 20th November, 1843, to the defendant's husband, in whose possession and that of his family the property remained for twenty-nine years before the plaintiff made any claim to it in 1874, to the settlement officer, who in October, 1874, rejected his claim. The plaintiff then allowed two years and a half to elapse before he brought the present suit. The lower appellate Court, after reviewing the old Regulations which related to transfers by the Collector of a defaulting share or patti of an estate, distinguishes the alleged transfer in this case from those made by authority, and if we understand him aright, he appears to regard it as one made by agreement or mutual understanding between Bal Singh and Ratan Singh and Dirgpal Singh, and accepting that view, he looks upon their possession as that of trustees or mortgagees. But as already observed there is no other evidence of a mutual understanding or agreement then the entry in the settlement record, by which, as we are advised at present, no trust was raised. All the circumstances point to a different conclusion from that at which the Judge has arrived. There was a sale in execution of a decree, and very soon after a sale by the auction-purchaser to Ratan Singh and Dirgpal Singh, and immediately, or very soon afterwards, the latter obtained full possession of the four biswas and paid up all the arrears due upon the share, and at this time the lower appellate Court itself admits "that there is no record to show that Bal Singh's rights and interests were recognised as then existing, and that an assignment of them was made to Ratan Singh and Dirgpal Singh by authority," though, strange to say, he adds that the presumption is that they were so transferred as in similar cases of default of land revenue. The presumption would appear to be the other way, assuming it to be the fact, as stated by the Judge, that Bal Singh's rights were not even recognised by the revenue authorities. It is also inconsistent with the other view of the case which he immediately adopts, that by private agreement or mutual understanding Ratan Singh and Dirgpal Singh held as mortgagees or trustees. Assuming however that the Judge is right in this view, we are of opinion that he was justified in holding that the claim was barred by limitation, for there is nothing whatever to prove, nor is it alleged, that the purchasers from Ratan

Singh and Mardan Singh in November, 1843, took the property with any notice of the trust, and it is certain that the purchasers in 1843 bought for a valuable consideration and have been holding ostensibly as proprietors from that date. Under these circumstances limitation would run from the date of that conveyance. So that this suit fails altogether, whether or not we admit a trust in 1839-40, and we therefore dismiss the appeal and affirm the judgment with costs.

*Appeal dismissed.*

## CRIMINAL JURISDICTION.

*Before Mr. Justice Straight.*

IN THE MATTER OF THE PETITION OF GOBIND PRASAD AND ANOTHER.

*Act XLV of 1860 (Penal Code), s. 441—Criminal trespass.*

Certain immoveable property was the joint undivided property of *C*, *G*, and a certain other person. *R* obtained a decree against *G* for the possession of such property and such property was delivered to him in the execution of that decree in accordance with the provisions of s. 264 of Act X of 1877. *C*, in good faith, with the intention of asserting her right, and without any intention to intimidate, insult, or annoy *R*, or to commit an offence, and *G*, in like manner, with the intention of asserting the right of his co-owners, remained on such property. *Held* that, under such circumstances, they could not be convicted of criminal trespass (1).

Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal trespass unless the intent to commit an offence or to intimidate, insult or annoy is conclusively proved.

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The facts of the case are sufficiently stated, for the purposes of this report, in the judgment of the High Court.

Mr. *Leach*, for the petitioners.

Pandit *Ajudhia Nath*, for the opposite party.

STRAIGHT, J.—This is an application for revision under s. 297, Criminal Procedure Code, of an order of the Magistrate of Mirzapur, passed upon the 3rd of September last, convicting two

(1) See also *Empress v. Budh Singh*, I. L. R., 2 All. 110.

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persons, namely one Gobind Prasad and Chaurasi, his wife, of criminal trespass under s. 441, Penal Code. The case has been very fully and exhaustively discussed before me by the pleaders on both sides, and I must frankly say, that I have experienced the greatest difficulty in forming any determinate opinion upon it. This has arisen from the unusually vague and elastic language used in s. 441, which, if not closely scrutinized and strictly interpreted, might lead to its application to sets of facts or circumstances, for which it was never intended by the Legislative authorities who framed it. For it is easy enough to conceive multitudinous cases, some approaching the verge of absurdity, that would fall within the letter, not the spirit, of the section, and which no one would for a moment consider fit subject even for civil proceedings, much less for a prosecution in a criminal court. To lay down any rule, as to the extent to which its operation should be limited, is scarcely possible, but it is plain that its scope must be confined within those bounds that common sense and sound reason dictate. In this view let us see what the words of the section practically enact, and how they are to be practically applied. First, there must be an unauthorised entry into or upon property,—unauthorised, that is to say, either directly against the will of the person in possession, or constructively against his will, in the sense that he who enters has an unlawful intention, which, were it known to such person, would make him object, forbid or prevent the entry that in ignorance of such intention he sanctions and permits; or, again, if the entry has been lawfully and legitimately obtained, there must be an unlawful “remaining,” either directly or constructively against the will of the person in possession, to be judged by the tests already explained. In either case, the unlawful entry or unlawful remaining must be with intent (i) to commit an offence, (ii) to intimidate, (iii) to insult, (iv) to annoy, any person in possession of the property. As to these intents, the first three are sufficiently explicit by the light of ss. 40, 503 and 504 of the Penal Code; but as to the fourth, very grave difficulty arises to ascertain what is or is not meant. Is the word “annoy” to be taken in its fullest and most general sense, or with what limitations is it to be construed? The varieties and differences of human temperament are so innumerable that it is next to impos-

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sible to estimate to what lengths a literal definition might not extend. It is a matter of daily observation, that what will annoy one man will not disturb an emotion in another ; and in a vast community like the native population of this country, the endless fancies, feelings and prejudices, religious or caste-born, necessarily are stronger and more sensitive with one set of persons than with another. It must, therefore, be that the word "annoy" in this section 441 must have some plain and intelligible construction placed upon it, and its application must not be left to depend upon each individual case and the peculiarities of character or idiosyncrasies of feeling of the special person who comes forward to complain. It seems to me that the word "annoy" in s. 441 must be taken to mean annoyance that would generally and reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual.

I cannot agree in the argument of the pleader who appeared to support the conviction, that where an entry upon property is in itself illegal, that is sufficient to establish one of the criminal intents required by s. 441. Because an act is illegal in the sense that it is a breach of a man's duties and obligations under the civil law to obey and submit to any process that is sought to be enforced against him by execution or otherwise, it does not follow as a necessary consequence that that act is criminally unlawful and therefore punishable. The intent with which the act is done must be established by clear and convincing evidence of such character and description as the particular nature of the case requires.

So far I have dealt with the intent to annoy. But with intent to annoy whom? "Any person in possession of such property." Then the question arises what sort of possession is here intended, express or implied, constructive, in the sense of "legally entitled to", or actual, as contemplated in s. 530, Criminal Procedure Code. As to this last-mentioned provision, it is plain that, in the interest of public peace, it may be used to declare and protect the possession of a mere trespasser until he is "ousted by due course of law." How far a person in that position could invoke the provisions of s. 441 of the Penal Code against the party "legally entitled to possession," for making an entry upon property in the occupation of

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the trespasser, I am not prepared here to discuss. That would be opening up the discussion of a question of so expansive a character that, as it is unnecessary for the purposes of the decision of the present case, I avoid entering upon it. Suffice it that, to deal with the matter before me, I am of opinion the possession contemplated and intended by s. 441 must be actual in the sense and meaning of s. 530, Criminal Procedure Code.

Having thus dealt with the legal aspects of s. 441, let us see in what way it can be applied to the present case, the circumstances of which are as follows:—On the 16th January, 1873, Gobind Prasad, Chaurasi his wife, and his brother Kalika, jointly mortgaged to one Ram Ratan Das four houses, two situate in Narghat, in Muzaffarganj mohalla, and one at Tirmohani, for an advance of Rs. 2,000. It was stipulated by the deed that the loan should be repaid within six months, otherwise it would become a deed of conditional sale. Neither the capital sum nor any portion of it was repaid within the time mentioned, and on the 12th February, 1874, notice as required by s. 8 of Regulation XVII of 1806 was duly issued. Some arrangement then appears to have been come to between the mortgagors and the mortgagee, the result of which was that, on the 4th July, 1874, the two houses at Narghat were sold for Rs. 833-8-0 and the proceeds of such sale were handed over to Ram Ratan Das. The year's grace from the notice of February, 1874, ran out, but no further steps were taken by the mortgagee, who on the 15th March, 1875, accepted a further sum of Rs. 300 on account of his debt, thus making a total of Rs. 1,133-8-0 paid in satisfaction of the original principal sum of Rs. 2,000. On the 24th August, 1876, an order of foreclosure was made and issued. Thereupon a suit for possession was instituted, which was met by the defence that, as the plaintiff had accepted the payments before mentioned, his claim to foreclosure was barred. The Subordinate Judge of Mirzapur, who tried that case, decided in the plaintiff's favour, and against his decision Chaurasi and Kalika appealed. The judgment, however, stood good as against Gobind Prasad, who, on the 25th June, 1877, executed an agreement by which he promised to pay the balance due, with interest, within one year, failing which the plaintiff should have a decree for possession. It was intended that Kalika and Chaurasi should be parties to that document, but

as a matter of fact they were not: on the contrary, they lodged an appeal against the Subordinate Judge's decision, which was heard on the 29th November, 1877, and resulted in their favour. Gobind Prasad failed to fulfil the terms of the agreement, and the twelve months having elapsed and principal and interest not having been paid, Ram Ratan Das applied to be placed in possession of the two houses in Muzaffarganj mohalla and Tirmohani. To this Gobind Prasad objected: firstly that the grounds upon which the appeal of Kalika and Chaurasi had been allowed applied equally to him as a matter of defence to the plaintiff's claim; secondly that the houses were the joint property of himself and the other two mortgagors of the mortgage-deed of 1873. The Subordinate Judge passed an order of possession on the 2nd November, 1878, against which Gobind Prasad appealed to the Judge, and his case came on for hearing and was disposed of on the 14th November, 1878, the appeal being dismissed. Meanwhile, on the 11th November, the amín of the Court had gone to give possession of the house in Muzaffarganj mohalla to Ram Ratan Das, but he there found Kalika and an agent of Chaurasi on the chabutra, who said they owned a share of the house "and objected, and so I went back and reported to the Court". A few days later another amín was sent, who gave possession as directed by s. 264 of the Civil Procedure Code, Kalika objecting and Gobind Prasad being upon the premises at the time. This was the full extent of possession ever obtained by Ram Ratan Das. Between November, 1878, and April, 1879, disputes continued between the parties, and instead of directing his attention towards obtaining possession of the house in question by due process of law, Ram Ratan Das seems to have resorted to the Criminal Court for sureties of the peace by Gobind Prasad and his relations, no doubt with the view of making a cheap short cut to secure his object, namely, to force a surrender of the property. Ultimately, early in April, he preferred a charge under s. 441 against Gobind Prasad and Chaurasi for criminal trespass, which he alleged to have taken place on the 15th April. For some reason best known to himself the Magistrate, instead of taking up the case under the section upon which complaint had been made, proceeded of his own motion to deal with the matter under s. 520, Criminal Procedure Code, and on the 8th May he

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found that Gobind Prasad and his wife were in possession of the house, but he directed them "to clear out within 10 days." This most irregular order, made in the teeth of the words of the section, came up to this Court for revision and was necessarily quashed by Mr. Justice Oldfield, who directed that the possession of Chaurasi must be maintained, while he at the same time pointed out that the complaint under s. 441 should be disposed of.

On the 14th July Gobind Prasad and his wife appeared before the Magistrate, to answer the charge under s. 441 for the alleged trespass on the 15th April, and after a hearing they were on the 14th July convicted and fined one rupee. They took no steps to set this conviction aside, and on the 1st September a second complaint was lodged before another Magistrate against them for an alleged trespass on the 14th July, the very day when they had been in attendance at the Magistrate's court. Upon this charge, after they had been given twenty-four hours' grace to turn out of the house, they were, on the 3rd September, convicted and fined Rs. 200 each. It is that conviction and sentence that now comes before this Court for revision. The only other facts that should be recapitulated are that, on the 17th February, Gobind Prasad had filed an application to be declared insolvent, which was rejected by the first Court but granted on appeal to this Court, and that on neither occasion before the Magistrate did Ram Ratan Das himself appear as a witness or to support his complaint.

Such were the circumstances out of which the Magistrate was called upon to decide as to the guilt or otherwise of Gobind Prasad and his wife under s. 441, Penal Code, and it is as to the propriety of his determination upon that point that the case now comes before this Court. I do not forget that I must deal with it, not as I should with an appeal, but simply as a matter for revision under s. 297, Criminal Procedure Code. At the same time it is my duty to see that the Magistrate had before him sufficient legal evidence to justify him in convicting. Applying the tests I have already adverted to in the earlier part of this judgment, I am clearly of opinion that no such possession as is required by s. 441 was ever proved to have been in Ram Ratan Das so as to make Gobind Prasad liable either for his "entering into" or "remaining" on the premises in

question. Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal trespass unless the intent to commit an offence, or to intimidate, insult or annoy is conclusively proved. Evidence of any such intent in this case seems to me to be altogether absent, nor does the complainant himself come forward to establish anything of the kind. Rightly or wrongly, both Kalika and Chaurasi allege a joint interest in the house in Muzaffarganj mohalla, and the former has made formal objection to possession of it being given to Ram Ratan Das. The original mortgage was joint, and of all four houses jointly, the loan was joint, the payment of the Rs. 1,133-8-0 was made on the joint account, and so accepted by the mortgagee, and the agreement of 25th June, 1877, was intended to be joint, though it was only executed by Gobind Prasad. Without enumerating other facts in the case, that appear to me to negative any of the intents under s. 441, there is quite sufficient to justify Gobind Prasad in protesting that what he has done has been with the *bond fide* object of asserting his rights or the rights of his co-sharers. Ram Ratan Das, if he had thought proper to do so, had only to put the machinery of the civil law in motion, and it would have accomplished for him all that he required, but he elected to appeal to the Criminal Courts, and he has no one to blame but himself if he finds that he must now revert to the course of procedure he should have originally adopted. The convictions are quashed.

*Convictions quashed.*

## APPELLATE CIVIL.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield*

RAMADHIN AND ANOTHER (DEFENDANTS) v. MAHESH AND ANOTHER (PLAINTIFFS)

*Arbitration—Filing of award—Appeal—Act X of 1877 (Civil Procedure Code), ss. 2, 520, 521, 522, 525, 526, 538.*

Where, in a suit for the filing of an award made on a private reference to arbitration, the Court of first instance, holding that there was no reason to remit such award to the reconsideration of the arbitrator, under the provisions of s. 520

\* First Appeal, No. 69 of 1878, from a decree of Maulvi Sultan Husain, Subordinate Judge of Gorakhpur, dated the 5th April, 1878.

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GOBIND  
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of Act X of 1877, or to set it aside under s. 521 of that Act, did not proceed to give judgment according to such award followed by a decree, but merely directed that such award should be filed, *held* that its order was not appealable as a decree, or as an order.

THIS was a suit in which the plaintiffs claimed under s. 525 of Act X of 1877 that an award made on a private reference to arbitration should be filed in court. The defendants objected to the award being filed on the ground that the arbitrator had determined matters not referred to arbitration, that the award was vague and consequently incapable of execution, and that the arbitrator had been guilty of misconduct and corruption. The Court of first instance, holding that the award was valid, made an order in the following terms: "Ordered, that the claim of the plaintiffs be decreed."

Ramadhin and Tulsi Ram, two of the defendants, appealed to the High Court against "the decree" of the Court of first instance, contending that the arbitrator had determined matters not referred to him, and had been guilty of misconduct and corruption.

Pandit *Ajudhia Nath*, *Lala Lalta Prasad*, and *Maulvi Medhi Hasan*, for the appellants.

*Mr. Niblett* and *Munshi Kashi Prasad*, for the respondents.

The following judgments were delivered by the High Court:

STUART, C. J.—A preliminary objection is taken by the plaintiffs, respondents, that the present appeal does not lie, seeing that it is an appeal from an order, which, taken in connection with the relief asked for in the plaint, is simply an order directing the award to be filed as provided by s. 526, Act X of 1877, and that such an order is not one of those made appealable by s. 588. This objection must be allowed. The award in the present case was made in a private arbitration, but the effect of s. 526 is to place it on the same footing as an award made in an arbitration made before the Court, and the procedure to be followed for enforcing the award must be precisely the same in both cases. Instead therefore of the Subordinate Judge recording the order he has made, by which he appears to decree the plaintiffs' claim on its merits, he should have proceeded as directed by s. 526, read in connection with s. 522 of Act X of 1877, and given a formal

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judgment according to the award and a decree following upon such judgment. And this he ought to do still. The present appeal is an incompetent proceeding; we cannot hear it but must disallow it with costs.

OLDFIELD, J.—The suit before us was brought for filing an award under s. 525, Act X of 1877. The Subordinate Judge has decreed the claim, and the first question we have to determine is whether the appeal now preferred by the defendants is maintainable. By s. 525 the application made under that section has to be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants, and it is incumbent on the Court to determine if any such grounds as are mentioned in ss. 520 and 521 are shown against the award, and if not, it is provided by s. 526 that “the Court shall order the award to be filed, and such award shall then take effect as an award made under the provisions of this chapter,” i.e. chapter xxxvii. I understand this to mean that the Court, after ordering the award to be filed, shall proceed to do as directed in s. 522, i.e. give judgment according to the award and follow the judgment so given by a decree (1), and that the decree will then be enforced in the manner provided for the execution of decrees, and no appeal will lie from such a decree except in so far as the decree is in excess of or not in accordance with the award. In the suit before us the Subordinate Judge has determined questions under ss. 520, 521, but his final order is merely that the claim be decreed, and looking to the plaint and the nature of the claim this amounts only to an order for filing the award; no judgment according to the award followed by a decree required by s. 522 can be said to have been given, and the question does not arise whether there is an appeal with reference to the provisions of s. 522.

Nor do I consider that there is any appeal from the order that has been made. It is not one of those orders from which an appeal is allowed by s. 588, and it cannot be held to be a decree as the word is defined in s. 2, Act X of 1877, so as to give a right of appeal as from a decree, as has been urged before us, for the order is not the formal order of the Court in which the result of the

(1) *Sahib Ram Jha v. Kashee Nath Jha*, 21 W. R. 295.

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suit (and the proceeding is a suit) is embodied; the order for filing an award is but an interlocutory order, a step in the decision of the suit, the result of which is embodied in the final decree which the law (s. 522) directs shall follow judgment. The Court below should be moved to give judgment in accordance with the award and a decree to follow it. There may or may not be an appeal from that decree according to circumstances, but this appeal must I think be dismissed with costs.

*Appeal dismissed.*

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*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.*

SHEO PRASAD, (DEFENDANT) v. A. B. MILLER, OFFICIAL ASSIGNEE TO THE HIGH COURT, CALCUTTA, (PLAINTIFF).\*

*Stat. 11 and 12 Vict., c. 21 (Insolvent Act), ss. 21, 24, 26, 32—"Voluntary" conveyance by Insolvent.*

Where two days before a person was adjudicated an insolvent and his property had by order vested in the Official Assignee, under the provisions of Stat. 11 and 12 Vict., c. 21, such person had, not spontaneously, but in consequence of being pressed, assigned to a particular creditor certain property, *held* by STUART, C. J., that such assignment was not "voluntary" within the meaning of s. 24 of that Statute, and was therefore not fraudulent and void under that section as against the Official Assignee.

*Held* by PEARSON, J., that such assignment was not a voluntary one in the sense that it was made spontaneously without pressure, but as the vesting order was not passed on a petition by the insolvent for his discharge that section was not relevant to the case.

ONE Baij Nath and his two brothers Bansi Dhar and Ghasi Ram carried on business at Calcutta under the style of Nanu Mal. These persons also carried on business at Cawnpore under the style of Bansi Dhar and Ghasi Ram, and at Lucknow under the style of Chotey Lal and Sita Ram. On the 20th December, 1875, the firm of Bansi Dhar and Ghasi Ram were indebted to Sheo Prasad the defendant, who carried on business at Cawnpore, in certain moneys. On the same date one Ram Prasad residing at Lucknow was indebted to the firm of Chotey Lal and Sita Ram in certain moneys. On the 21st December, 1875, two of the creditors of the firm of Nanu Mal applied to the Calcutta High Court that Baij Nath and his partners might

\* First Appeal, No. 151 of 1878, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 25th September, 1878.

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be adjudicated insolvents. On the 22nd December, 1875, such persons were adjudicated insolvents by that Court, and that Court made an order vesting their property in the Official Assignee of the Court. In December, 1877, Mr. A. B. Miller, the Official Assignee, instituted the present suit against the defendant to recover from him the amount of Ram Prasad's debt to the firm of Chotey Lal and Sita Ram, which he alleged had been fraudulently transferred to him by Baij Nath. This debt was transferred under a "*rukka*" drawn on one Kanahiya Lal by Ram Prasad in favour of one Paras Ram, the agent of the defendant. That *rukka* was drawn in the following terms:—"My friend Lala Kanahiya Lal, Rs. 10,352 are due by me to Baij Nath: I now draw this *rukka* in your favour to the effect that under his assignment I am causing Rs. 9,452 to be paid to Paras Ram on account of his debt: take a receipt from Paras Ram according to this *rukka* and enter the amount in my account: I will give credit for this item against my item of deposit, at the time of adjustment of accounts: it is necessary that you should attend to this matter." The *rukka* purported to have been drawn on the 20th December, 1875. The plaintiff alleged that the debt had been transferred, not as appeared from the *rukka* and the books of the firm, before the 22nd December, 1875, when Baij Nath, Bansi Dhar, and Ghasi Ram were adjudicated insolvents, but after that date, and that the transfer was fraudulent and void. From the evidence of Paras Ram it appeared that the *rukka* was drawn under these circumstances: Two or three days previously to the 20th December, 1875, Paras Ram had learnt that the Bank of Bengal at Lucknow had refused to negotiate a *hundi* drawn by Baij Nath, and he had therefore on behalf of the defendant asked Baij Nath for the money due to the defendant. On the 20th December, 1875, he again asked Baij Nath for the payment of the debt, requiring payment in cash. Baij Nath replied that he had no money, but that if Paras Ram would accompany him to Ram Prasad's house, he would cause Ram Prasad, who owed him money, to pay the debt. Paras Ram accordingly accompanied Baij Nath to Ram Prasad's house, where a settlement of accounts took place between Baij Nath and Ram Prasad, and a balance of Rs. 9,452 being found due to the former by the latter, Ram Prasad drew the *rukka* in question and gave it

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to Paras Ram. The Court of first instance held that the debt was transferred after the 22nd December, 1875, and that the transfer was fraudulent and void, and gave the plaintiff a decree. The defendant appealed to the High Court.

Mr. Colvin, Pandit Bishambhar Nath, and Babu Beni Prasad, for the appellant.

Mr. Howard and Mr. Greenway, for the respondent.

The following judgments were delivered by the Court:

STUART, C. J.—This appeal must be allowed. The simple question is whether the *rukka* drawn by Ram Prasad on Kanahiya Lal was transferred by the former to the defendant, Lala Sheo Prasad, honestly and for good consideration, or “voluntarily” within the meaning of that word in s. 24 of the Insolvent Act 11 and 12 Vict., c. 21. That is the sole question before us, and it must be answered favourably for the *rukka* and against the plaintiff. The facts material to the question may be stated as follows:—The *rukka* was drawn and transferred to the defendant on the 20th December, 1875, and on the 22nd December, 1875, the parties represented by the plaintiff were adjudicated insolvents by the Calcutta Insolvency Court. By s. 20 of the Insolvent Act the whole estate of the insolvent, without necessity of express conveyance or assignment, vests in the Assignee in trust for the benefit of the insolvent’s creditors. By s. 21 it is provided that the Assignee shall take possession of such estate, and by s. 26 it is, among other things, enacted that persons holding property of, or being indebted to, the insolvent shall hold such property for, and pay according to such indebtedness to, the Assignee for the general benefit of the creditors of such insolvent. These sections of the Insolvent Act give to the Assignee an absolute title to and complete control over the entire estate of the insolvent as at the date of the vesting order. But by s. 24 of the Act it is enacted that “if any insolvent \* \* \* shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, \* \* to any creditor, or to any other person in trust for or to, or for the use, benefit, or advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in insolvent circumstances and within

*two months* of the date of the adjudication of insolvency \* \* \* shall be deemed, and is hereby declared to be fraudulent and void as against the assignee of such insolvent". Relying on this section the plaintiff claims the value represented by the *rukka* on the ground, first, that the 20th December, 1875, was not its true date, and secondly, even if it was, that the *rukka* was given voluntarily and fraudulently, that is, in fraudulent preference of the defendant. But I can see nothing in the evidence to support such a contention. It is very clear in the first place that the 20th December, 1875, was the true date of the *rukka*; this is the plain inference from all the evidence on the subject. The plaintiff's recorded statements to the contrary are not distinct and absolute according to certain knowledge on his part, but as rather suggestedly asserted with the view apparently of giving him a *locus standi* for contending that the date of the *rukka* was subsequent to the vesting order, and the transaction was voluntary and fraudulent within the meaning of s. 24 of the Insolvent Act. It is also in evidence that the debt represented by the *rukka* was due by Baij Nath to the defendant, and there was therefore good consideration for the transfer to the defendant. There is also evidence to show that the defendant Sheo Prasad, by himself or by Paras Ram his manager, had been pressing for payment of the debt due to the defendant by Baij Nath, and it is further in evidence that Ram Prasad discharged his debt to Baij Nath by honestly and in good faith transferring to the defendant the *rukka*, which appears to have been duly cashed by Kanahiya Lal. Under these circumstances it is idle to argue that the *rukka* was obtained by the defendant by any voluntary or fraudulent act on the part of Ram Prasad.

Some English cases were referred to at the hearing on the part of the appellant and they appear fully to support his contention. Thus in *Strachan v. Barton* (1) it was laid down that, in order to make a payment to a creditor by a bankrupt a fraudulent preference, the bankrupt must be a volunteer, and not pay in consequence of any request or pressure for payment on the part of the particular creditor. During the argument Pollock, C.B., remarked that the simplest request may be sufficient if payment was the result of that request. In answer to a suggestion by counsel that there

(1) 25 L. J. N. S. Ex., 182.

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was no request, and that the offer of payment on the part of the bankrupt was voluntary, the Chief Baron observed that it was only voluntary in the sense that the bankrupt offered it to satisfy the demand of the creditor, and he gave his judgment in accordance with these views. Alderson, B., was of the same opinion. He said : "The question is what is the meaning of a voluntary payment ? I understand it to be a payment made by the debtor alone," that is, by the debtor without pressure or solicitation on the part of his creditor. He goes on to say, "The test in cases such as the present is, would the bankrupt have made the payment without the creditor's coming?" In the present case the creditor undoubtedly did come, for it is clear from the evidence to which I have referred that Baij Nath was hard pressed for payment by the defendant and his manager. In the same case Martin, B., concurring, observed that "every creditor has a right to go to his debtor and get his debt, if he does so *bonâ fide*. But in *Mogg v. Baker* (1) it was distinctly laid down, that a payment is not necessarily voluntary because pressure, in the ordinary sense of the word, has not been used. There the question was, whether a possession of goods was voluntary under the then Insolvent Act. Lord Abinger, than whom no man better understood the law on this subject, said, 'that if a demand is made by a creditor *bonâ fide*, and a transfer takes place in pursuance of that demand, that takes it out of the case of voluntary transfer contemplated by the Insolvent Act', and he observes that the constant practice at Nisi Prius has been that a demand by a creditor is sufficient."

Another case referred to at the hearing was that of *Ex parte Hitchcock* (2) before Bacon, Chief Judge in Bankruptcy, where traders in a hopeless state of insolvency, three days before they suspended payment, paid in the ordinary course of business, and without any motive for favouring the payee, a considerable sum to a creditor, who received it *bonâ fide*, and the payment was upheld. In giving judgment Bacon, C. J., said, "The act of the debtor was the only thing that could be inquired into, and if the act done by him could be referred to any other motive than that of giving one creditor preference above another, the payment

(1) 4 Mee. and W. 348 ; S. C., 8 L. J. N. S. Ex. 55.

(2) 40 L. J. N. S., Chanc. and Bankr. 79.

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would not be fraudulent or void". In the same judgment (p. 82) it was further observed: "Here was a debt paid to a person entitled to receive it, and received in good faith by the payee. Clearly, it came within the proviso at the end of the section. The statute had put the law upon a plain, reasonable, straightforward footing, by having saved the rights of payees acting in good faith. No motive could here be assigned for the bankrupts preferring this creditor to any other. In order to make out that the payment was fraudulent, it should have been proved that there was such a preference, or some motive for presuming such a preference must be shown from the other facts proved. Here a fraudulent preference was neither proved, nor could it be justly or reasonably inferred that there was any motive for such preference."

Many other authorities might be cited to the same effect, and they all go to show that, until the bankruptcy or insolvency of a debtor takes legal effect, he does not act voluntarily in the sense of giving a fraudulent preference, where he simply pays a debt that is really due at the request, in good faith, of a particular creditor. That such was the state of things in the present case cannot reasonably be doubted. And this view of the facts before us derives considerable force when the present state of the law of debtor and creditor in these Provinces is considered. I have already in another case, *Kheta Mal v. Chuni Lal* (1), shown what that law is, and I may be here allowed to repeat what I there laid down, I there said:—"There is no bankruptcy law in these Provinces, nor any coercive legal process which can be enforced against the property of an unwilling insolvent for the benefit of all his creditors. A person in the position of the present defendant, appellant, may avail himself of the provisions of the Code of Civil Procedure for the purpose of being relieved of his debts, but he can only do so under the conditions of that Code, he himself being the applicant, and under executed process by arrest or imprisonment. No such result can be attained by the legal action of any or even all of an insolvent's creditors. Doubtless creditors and their debtors can agree as to the disposal of property for the benefit of the former, and that is an agreement of course that can be given effect to. But irrespective of such an agreement among a debtor and

(1) I. L. R. 2 All. 173.



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his creditors, the law, at least in these Provinces, places no compulsory machinery in the hands of the creditors as a body. On the other hand, there is no law in this country to prevent a debtor from making an assignment of his estate for the benefit of all or a limited class of his creditors; nor, for that matter, from his assigning, conveying, or settling his estate in favour of any person or persons whom he may wish to favour, provided of course that he makes those assignments, settlements, or conveyances without fraud, that is, honestly and in good faith. The fundamental principle that underlies this state of things is that, so long as the law does not step in to deprive a man of his control over his estate, he remains *sui juris*, and can up to the last moment of its possession deal with his property as he thinks fit. The legal right remains in him, and if he acts honestly and in good faith, and not fraudulently, he may transfer his estate, or any portion of it, to any one or more of his creditors, but whose acceptance of such transfer or assignment; or whatever the form of the conveyance may be, of course deprives them of all further relief against their debtor, and the only remedy of other persons to whom he is indebted, and who have by that means been excluded from any such transfer, assignment, or other conveyance, can only be against such property of the debtor as may not have been so dealt with, or against the debtor's person (1)." Such undoubtedly is the law binding on this Court, and according to it, Baij Nath and the defendant, acting without any fraudulent intent, but in good faith, with respect to a debt honestly due by the one to the other, were justified in their dealing, and the plaintiff cannot interfere between them.

The Subordinate Judge does not appear to have understood the law on the subject, but has occupied himself with irrelevant and trivial considerations and details quite immaterial to the case. And not apparently knowing the law he was probably misled by the somewhat confused and evasive contention on the part of the Official Assignee persistently and elaborately maintained before him. Our judgment must therefore be for the appellant, and the suit must be dismissed, with costs in the Court below and in this Court.

PEARSON, J.—Ram Prasad's debt to the firm of Chotey Lal and Sita Ram, and that firm's debt to the defendant, appellant,

(1) at page 179.

on the date of the alleged transfer of the former debt are not points in issue. The single point for determination is, whether the assignment was made before or after the date of the order by which the property of the insolvents, Baij Nath, Bansi Dhar, and Ghasi Ram was vested in the plaintiff. (After determining that the assignment was made before the date of the vesting order, the learned Judge continued): The assignment made by him was not a voluntary one in the sense of having been made spontaneously without pressure, but as it has been stated by the respondent's attorney that the vesting order of the 22nd December, 1875, was not passed in consequence of any petition filed by the insolvents for their discharge, s. 24 of the Insolvency Act is not apparently relevant to the case. I would decree the appeal and dismiss the suit with all costs.

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*Appeal allowed.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

SURJU PRASAD (PLAINTIFF) v. BHAWANI SAIHAI (DEFENDANT) \*

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*Suleh-nama—Mortgage—Agreement creating a charge on immoveable property—Registration—Stamp—Suit for money charged on immoveable property.*

Certain immoveable property having been attached in the execution of a decree held by S, B and L objected to the attachment. An arrangement was subsequently effected between the objectors and the parties to the decree which resulted in all parties jointly filing a "suleh-nama" in court, in which B and L, who had purchased the rights of the judgment-debtor in the attached property, agreed to pay the amount of the decree, which exceeded one hundred rupees, within one year, and hypothecated such property as security for the payment of such amount. S having sued upon this document claiming to recover the amount of the decree by the sale of such property, held that the document required to be registered, and not being registered the suit thereon was not maintainable.

Cases decided by the High Court in which the "suleh-nama," having been relied on, not as containing the hypothecation itself, but as evidence only of a separate parcel agreement, or in which a decree having been made in accordance with the terms of the document, was held not to require registration, remarked upon and distinguished by SPANKIE, J.

THIS was a suit for Rs. 150-7-3, being the amount of a decree dated the 4th August, 1865, charged on certain immoveable property by a "suleh-nama" dated the 30th July, 1866.

\* Second Appeal, No. 118 of 1879, from a decree of H D. Willock, Esq., Judge of Azamgarh, dated the 20th November, 1878, affirming a decree of Maulvi Muhammad Zahur Hussain, Munsif of Azamgarh, dated the 26th June, 1878.

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The plaintiff obtained this decree against one Bhika Rai and applied for its execution against his judgment-debtor. The property on which the plaintiff now sought to enforce a charge was attached in the execution of this decree and advertised for sale. One Bhawani Sahai and his brother Brij Lal objected to the attachment and sale of this property. On the 30th July, 1866, the pleader for the decree-holder, the pleader for Bhawani Sahai, the pleader for Brij Lal, and the pleader for the judgment-debtor presented to the Court executing the decree the "*suleh-nama*" in virtue of which the plaintiff now sued. This document, upon which a court-fee of eight annas had been paid, recited that the interests of the judgment-debtor in the property had been sold to Bhawani Sahai and Brij Lal for the amount of the decree, Rs. 135-2-0, and that the judgment-debtor was no longer in the possession of his interests in the property, but such interests were in the possession of the purchasers. The instrument then proceeded as follows: "That it being necessary to satisfy the decree, we the objectors who are in possession of the property have undertaken to pay the amount of the decree, and promise to pay the same within one year: that in default of such payment the property shall be sold at auction in satisfaction of the amount of the decree: that until the payment of the amount, we the objectors have hypothecated the property and promise not to transfer it directly or indirectly: that if we wish to sell it in order to satisfy the decree, we shall obtain the permission in writing of the decree-holder to our doing so". This document was verified by the pleaders of the parties concerned. The Court upon its presentation ordered the application for execution of the decree and the objections to be removed from the file of pending cases. The decree not having been satisfied within the time mentioned in the document, the plaintiff applied for its execution against his judgment-debtor in February, 1868. In 1878 he again applied for the execution of the decree against his judgment-debtor. This application was refused on the ground that it was barred by limitation. The plaintiff subsequently brought the present suit on the "*suleh-nama*" against Bhawani Sahai, suing him in his own right and as the heir of his brother Brij Lal, who had in the meanwhile died. The defendant set up as a defence to the suit, among other things, that any charge created upon the property

by the document in suit could not be enforced as the charge exceeded Rs. 100 in value and the document was not registered, and that the document being improperly stamped could not be received in evidence. The Court of first instance held that the document was invalid being insufficiently stamped and dismissed the suit. On appeal by the plaintiff the lower appellate Court held, among other things, that the document required registration and not being registered could not affect the property in suit.

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The plaintiff appealed to the High Court.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the appellant.

Babu *Dwarka Nath Mukarji*, for the respondent.

The following judgments were delivered by the Court :

STUART, C. J.—It is unnecessary to consider the findings of the lower Courts in this case, as the objection taken on the ground of the *suleh-nama* not having been registered is fatal to the plaintiff's claim, and the appeal must therefore be dismissed with costs. There is also an objection that the document does not bear any stamp. The Judge suggests that it might still be stamped under s. 17 of the Stamp Act then in operation, X of 1862, but I do not observe that any offer of this kind was made by the plaintiff, and it need not be considered, seeing that the compromise cannot be looked at on account of its non-registration, the value covered by it being considerably more than Rs. 100. I must, however, guard myself against being supposed to acquiesce in the extraordinary and repugnant opinion recorded by the Judge respecting the effect of the *suleh-nama* on the plaintiff's claim. He finds that this instrument should have been registered, and not having been so it cannot be read in evidence, and yet at the same time he proceeds to argue upon its contents, calling it a new agreement which the plaintiff had violated and that the defendants are therefore free from their liability. I must therefore take care to confine myself to his decretal order by which he upholds the Munsif's decree dismissing the suit, and I would dismiss the present appeal with costs.

SPANKIE, J.—The plaintiff obtained a decree on the 4th August, 1865, against *Bhika Rai* for money. The house and pro-

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perty of the judgment-debtor were attached in execution of the decree. The defendant Bhawani Sahai and Brij Lal, deceased, and Mithu Lal, cousin of Bhika Rai, objected that the house was their property. An arrangement was effected on the 30th July, 1866, with the decree-holder, and a compromise filed in which the defendant and Brij Lal undertook that the money should be paid in one year, or in default to pay it, and they hypothecated the property that had been attached, in which they had privately become the purchasers of the shares of the judgment-debtor and Mithu Lal his cousin, as collateral security for the debt. The present suit is to recover Rs. 159-7-3 principal and interest, the amount of the decree, by sale of the property attached, and which was subsequently hypothecated in the compromise. The defendant Bhawani Sahai, for himself and as heir of Brij Lal deceased, contended that the suit was barred by lapse of time; that the property hypothecated was worth more than Rs. 100, but the instrument was not registered and not properly stamped; that after the compromise plaintiff continued to execute his decree against the judgment-debtor and received Rs. 50, thus acting in opposition to the terms of the compromise, which therefore became inoperative. The first Court held that there was an hypothecation of the property in the compromise, and that the deed was inadequately stamped, and to such an hypothecation no liability was attached: the defendant might have been personally liable, but more than twelve years had elapsed from the date of the compromise: the claim also was barred by the three years limitation as the hypothecation was a nullity. The suit was dismissed. The lower appellate Court noticed that in 1877, when plaintiff took out execution against the defendant, the Court held that defendant the judgment-debtor had been absolved from liability under the decree by the compromise, and the order was affirmed in appeal, and the plaintiff referred to the Civil Court. The Judge holds that it was not barred because plaintiff had prosecuted his claim with all due diligence in the execution department: the deed however was not properly stamped: but there was no reason to suppose that fraud was intended, and the plaintiff was therefore permitted to make good the value: but the deed required to be registered and being unregistered could not be received. The Judge also held that the plaintiff could not sue on the compromise,

because he himself had endeavoured to obtain the amount of his decree in execution after the compromise had been executed ; he therefore dismissed the appeal.

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It is contended in second appeal that, as defendant undertook to pay the money under the deed of compromise in 1866, he could not be released from his liability by the act of plaintiff in realising a portion of the decree from the judgment-debtor. Looking at all the circumstances of the case, and having regard to the fact that the money received by the decree-holder after the compromise had been executed, is said to be deducted from the amount now due from the parties who effected the compromise, we should not have been disposed to hold the respondent free from liability under the deed. But what is termed the compromise is, in this case, much more than a mere compromise. It accepts the debt due by the judgment-debtor, and the defendant and Brij Lal, who had purchased the interests of the judgment-debtor and his cousin Mithu Lal in the property attached, agree to discharge the debt in a year, and they hypothecated the property that had been attached, and which was purchased by them, as security for the debt. Such an instrument is a "mortgage-deed," inasmuch as by it the defendant and his brother obliged themselves to pay money to the plaintiff, and it evidences a pledge of the property for securing the payment of the money. Under the Stamp Act in force in 1866 this instrument, being an obligation for the payment of money, would not have been admissible as a mere agreement, or as a *razi-nama*, if it had been necessary to bring a suit upon it, and the later Acts are not less stringent. The immoveable property pledged, it is not denied, is worth more than Rs. 100, and the instrument should have been registered, as the suit to enforce the lien is brought upon the deed itself, and the plaintiff seeks under it to bring to sale the property hypothecated therein and thereby to recover his money. He cannot therefore say that the deed is simply a recital of a compromise, and it is to be regarded as merely information given to the Court of an oral agreement between the parties for the adjustment of the proceedings in execution pending in Court. The case cited by plaintiff, *Ramdyal v. Jhaunnan Lal* (1), does not apply, as in that case it did not appear that the agreement referred

(1) H. C. R., N.-W. P., 1871, p. 14.

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to in the compromise was made in writing. The actual agreement had been orally made, and the document put into Court was simply a petition informing the Court of the arrangement arrived at by the parties. The plaintiff's pleader has put in several decisions of this Court which he argues rule the point in his favour, and are to the effect that such documents as that now before the Court need not be fully stamped or registered as bonds or mortgages. But I have very carefully gone into these cases and now refer to them in detail.

*Bhikam Ram v. Hanuman Prasad* (1)—In this case the decree under the compromise dated 12th June, 1866, gave a lien on the property to the decree-holder, and the claim before the Court was not to enforce the compromise but clearly to enforce the lien given by the decree. *Jivan Singh v. Rampartab Singh* (2)—In this case the sixth plea in appeal raised the point whether the transaction in dispute was valid, the deed not having been properly stamped and registered. It is doubtful whether the plea was pressed. It is certain that the judgment does not determine the point and that it is absolutely silent with regard to it. *Mukand Ram v. Cheda Singh* (3)—In this case the petition put into Court was held not to be the agreement itself. It was filed in order to inform the Court that an oral agreement had been made and it asks for postponement of sale. The judgment proceeds upon the fact that the agreement itself (apart from the petition) had never been denied. *Bansidhar v. Ahmad Husain Khan* (4): *Bansidhar v. Muzaffar Husain Khan* (5)—In these cases there were several petitions asking for postponement of sale which were not alleged in the subsequent claim to have been the basis of that claim. The dispute arose out of the several agreements to pay high interest. When the cases came before the High Court the learned Judges ruled that the first Court had misunderstood the nature of the claim, which was not founded on the petitions, but on a separate oral agreement. There was no hypothecation whatever in those agreements or petitions. *Bisharath Husain v. Imamunnissa* (6)—

(1) R. A. 99 of 1875, decided 6th March, 1876.

(2) R. A. 54 of 1876, decided 9th November, 1876.

(3) S. A. 688 of 1876, decided 8th November, 1876.

(4) R. A. 82 of 1876, decided 3rd May, 1877.

(5) R. A. 42 of 1874, decided 21st August, 1874.

(6) R. A. 85 of 1876, decided 9th May, 1877.

In its judgment this Court expressly stated that it was satisfied that the document objected to was not a compromise, but simply a petition informing the Court regarding an arrangement at which the parties had arrived. This judgment cites, as ruling the point, the case of *Ramdyal v. Jhaunna Lal* (1) which I referred to above as cited by plaintiff's pleaders during the hearing, and which I have held inapplicable to the present case. It also cites for the same purpose the case of *Bansidhar v. Ahmad Husain Khan* (2) above referred to. The learned Judges lay it down that such a petition, not being the agreement itself, cannot be rejected as evidence of an arrangement between the parties simply because it was not sufficiently stamped and was not registered.

It will thus be seen that none of the rulings cited are applicable to this case in which the claim is based upon the hypothecation contained in the compromise. Here the document, put in in execution of a decree and not embodied in a decree charging the property, which property plaintiff seeks to sell in order to secure his money, is not relied upon as evidence of a distinctly separate parcel evidence, but as the hypothecation itself. Such a document I hold to be one which must be sufficiently stamped, and if necessary, as it is here, registered. I would therefore on this ground dismiss the appeal and affirm the judgment with costs.

*Appeal dismissed.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

RANJIT SINGH (DEFENDANT) v. SHEO PRASAD RAM (PLAINTIFF) AND  
RAGHU NANDAN RAM (DEFENDANT)\*.

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November 17.

*Appellate Court, Powers of—Addition of parties—Act X of 1877 (Civil Procedure Code), ss. 32, 582—Act XV of 1877 (Limitation Act), s. 22.*

*S* sued *N* and *R* jointly and severally for certain moneys. The Court of first instance gave *S* a decree for such moneys against *N* and dismissed the suit against *R*. *N* appealed from the decree of the Court of first instance, but *S* did not appeal from it. The Appellate Court, at the first hearing of *N*'s appeal, made *R* a respondent, the period allowed by law for *S* to have preferred an appeal having then

- (1) H. C. R., N.-W. P., 1871, p. 14. (2) R. A. 82 of 1876, decided 3rd May, 1877.

\* Second Appeal, No. 1152 of 1878, from a decree of R. Wall, Esq., Judge of Ghazipur, dated the 24th September, 1878, reversing a decree of Munshi Zamir-ud-din Ahmad, Assistant Collector of the first class, dated the 27th May, 1878.



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expired, and eventually reversed the decree of the Court of first instance, dismissing the suit as against *N* and giving *S* a decree against *R*. *Held* that, although the Appellate Court was competent to make *R* a party to the appeal, under ss. 32 and 582 of Act X of 1877, yet it was not competent, with reference to s. 22 of Act XV of 1877, to give *S* a decree against *R*, the former not having appealed from the decree of the Court of first instance within the time allowed by law.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court, to which Ranjit Singh, one of the defendants in the suit, appealed from the decree of the lower appellate Court.

*Lala Lalta Prasad*, for the appellant.

Munshis *Hanuman Prasad*, *Kashi Prasad*, and *Sukh Ram*, for the respondents.

The following judgments were delivered by the High Court :

STUART, C. J.—The question in this case is a very nice one, showing a certain conflict between the law of procedure and the law of limitation relating to suits and decrees. It is the first time I have met with it as a Judge of this Court, and I am not aware that it has arisen in any of the other High Courts. The circumstances under which it comes before us for decision in the present appeal are these :—The plaintiff, respondent, instituted a suit in the Court of the first class Assistant Collector at Gházipur, on the 14th December, 1876, against Raghu Nandan Ram and Ranjit Singh for recovery of Rs. 164-11-3 principal and interest, being the profits of a one-anna share in a zamindari estate from 1281 to 1282 fasli. A decree, however, was not made in that suit till the 27th of May, 1878, when the Assistant Collector found the claim proved as against Raghu Nandan Ram, and decreed accordingly against that defendant with all costs, but the suit as against Ranjit Singh was dismissed. Raghu Nandan Ram, however, the defendant against whom the decree had been given, appealed to the Judge who, after inspection of the record of the Court of first instance and hearing the pleaders of the parties, ordered that Ranjit Singh, although he had been absolved by the first decree, should be made a respondent in the appeal before him, and the appeal thus supplemented was heard by the Judge and decided by him against Ranjit Singh, whom in his judgment he somewhat inaccurately calls an “outsider,” but whom he nevertheless found accountable for a large

surplus, and he therefore decreed the appeal and set aside the order of the lower Court, thereby reversing the Assistant Collector's decree. The Judge added to his order this remark: "The effect of this decision will be that I give a decree in favour of respondent as against Ranjit for the amount claimed, viz. Rs. 164-11-3, with all costs, and interest thereon at six per cent per annum".

Against this order of the Judge the present second appeal has been brought in which it is contended, among other things, that the Judge's decree against Ranjit Singh was illegal, seeing that Ranjit held the decree of the first Court in his favour, and that decree, under the Limitation Law, Act XV of 1877, sch. ii, art. 152, had become final, seeing that the limitation period thereby prescribed, viz. 30 days, had expired before the filing of the appeal to the Judge. The two material dates are these, the 27th of May, 1878, when the Assistant Collector's decree dismissing the claim against Ranjit Singh was given, and the 10th of July following, when the appeal to the Judge was filed, so that 43 days had expired.

This contention on the part of the appellant must be allowed. As a general rule there can be no doubt that a Judge under the present procedure law, Act X of 1877, is acting within his powers when he orders a party in the position of this Ranjit Singh to be made a respondent in an appeal before him. Indeed, s. 582 read with s. 32 is to my mind sufficient for such a general conclusion. But in the present case there is this peculiarity, that the Judge, who must be taken to have known the law he was administering and the legal position of the parties in the matter in issue before him, was bound to take cognizance of the fact that, while he thought it desirable that Ranjit Singh should be made a party to the appeal, this same Ranjit Singh had obtained a decree in his favour in the suit which was the subject of that same appeal, and that since the date of such a decree the limitation period provided by law had run out, and that the appeal before him, so far as it impugned that decree, could not be entertained. Instead, however, of proceeding in this way, the Judge made an order as if Ranjit was a party properly before him, and which order therefore cannot stand. Whether such is a satisfactory state of the present law of procedure may perhaps be doubted, for it humbly appears to me

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to be very awkward and embarrassing that a power or discretion vested in a Judge for the purposes of justice may be defeated by another and almost contemporaneous law. The result is that the Judge's order against Ranjit Singh comes to nothing and must be set aside, and *pro tanto* the present appeal must be allowed with costs.

SPANKIE, J.—The plaintiff, respondent, sued Ranjit Singh, Raghu Nandan Ram, and others, defendants, for Rs 164-11-3 principal and interest, being the profits of a one anna share in a zamindari estate from 1281 to 1282 fasli. The question was whether Ranjit Singh or Raghu Nandan Ram, or both of them, owed the money claimed, and in what proportion the sum sued for should be recovered. The first Court decreed the claim in full against Raghu Nandan Ram and dismissed it in regard to Ranjit Singh. The defendant Raghu Nandan Ram appealed, but plaintiff accepted the decree which absolved Ranjit Singh and did not appeal from it as he might have done. The Judge found it necessary to make Ranjit Singh a respondent, and having done so, he decreed the appeal of Raghu Nandan Ram and set aside the order of the first Court. He added these words,—“The effect of this decision will be that I give a decree in favour of respondent as against Ranjit Singh for the amount claimed, viz., Rs. 164-11-3, with all costs, and interest at six per cent per annum”.

It is contended in second appeal by Ranjit Singh that, as neither plaintiff nor Raghu Nandan Ram had appealed against the Munsif's decree as regards him, no decree should have been passed against him in appeal: the Munsif's decree absolving him from all responsibility, not being appealed, became final: the powers given by s. 582, Act X of 1877, are not applicable to the case, and if they were, the appeal as against appellant was barred by limitation.

S. 582, Act X of 1877, provides that the Appellate Court shall have the same powers in appeal under ch. xli as are vested by the Code in Courts of original jurisdiction in respect of suits instituted under ch. v, and by s. 587 the provisions contained in ch. xli shall apply as far as may be to appeals under ch. xlii. After a suit has been instituted in the manner prescribed by s. 48, ch. v, the Court

has power under s. 32 (chapter iii, relating to parties and their appearances and acts), on or before the first hearing, upon the application of either party, to strike out the name of any party, whether as plaintiff or defendant, improperly joined. By the second clause of the section the Court has "*proprio motu*" power to order any plaintiff to be made a defendant, or any defendant to be made a plaintiff, and also that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. Under s. 73, Act VIII of 1859, and s. 37 of Act XXIII of 1861, corresponding with ss. 32 and 582 of Act X of 1877, the Appellate Courts in past years have always felt themselves at liberty to add parties who have been parties to the original suit. I have no doubt that the lower appellate Court in this case did not exceed its jurisdiction in making Ranjit Singh, a defendant in the suit, who was no party in the appeal, a respondent, to enable it effectually and completely to adjudicate upon and settle all questions involved in the appeal.

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It has, however, been urged that when Ranjit Singh, defendant in the suit, was made a party to the appeal as respondent, the limitation prescribed by law within which an appeal must be instituted had expired so far as he was concerned.

Cl. 5, s. 32, Act X of 1877, provides that "all persons whose names are added as defendants shall be served with a summons in manner hereinafter mentioned, and (subject to the provisions of the Indian Limitation Act, section 22) the proceeding as against them shall be deemed to have begun only on the service of such summons." It has been contended that "the parties whose names are so added" are parties whose names have been added on the application of the plaintiff, or on their own application, and that the clause does not refer to cases in which the Court acts on its own authority and without application. It has also been suggested that the preceding clause shows this. The clause runs thus:—"Any person on whose behalf a suit is instituted or defended under section 30 may apply to the Court to be made a party to such suit," and then follows the fifth clause, "all parties whose names are so added

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&c., &c." But this contention appears to be more ingenious than successful. Under all circumstances it would be necessary to serve a summons on every person made respondent by a Court, to enable him if absent to appear and answer the appeal, and such a party appears to be of necessity one of those "parties whose names are so added as defendants," that is to say, meaning "so added" under the clauses of s. 32 of the Act. At the same time the addition of a defendant to an appeal as respondent cannot override the law of limitation. In an appeal the appellant is for the time the plaintiff, and the respondent for the time defendant, and if cl. 5, s. 32 applies at all, it carries with it the saving of s. 22 of the Limitation Act, XV of 1877. S. 22 provides that when, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. This being so, I am of opinion that though the Court of appeal, if it hold it desirable for the purposes of justice, in order to determine the appeal, might make any one a party to it, who was a party to the original suit, or represented a party to the suit, it would not be able to decree the original claim as against the party so made a respondent, if the first Court had dismissed the suit in his favour and the plaintiff had not appealed against that part of the decree within the time prescribed by the Limitation Law.

I would therefore hold that the Judge should have closed the case by decreeing the appeal of Raghu Nandan Ram and reversing the order as against him, with costs payable by plaintiff, and further that the Judge should also have dismissed the appeal as regards Ranjit Singh, with costs payable by plaintiff, as the latter ought to have appealed against him within the time prescribed by law. At the same time, I do not think that it was necessary in this case for the Court to make Ranjit Singh a party to the appeal as plaintiff had accepted the first Court's judgment relieving him of liability, and the Judge had the record before him, which contained material sufficient to enable him to determine the appeal of Raghu Nandan Ram on the merits. I would decree the appeal with costs in favour of appellant, and not interfere with the rest of the judgment.

*Appeal allowed.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

HARBHAJ AND OTHERS (PLAINTIFFS) v. GUMANI AND ANOTHER (DEFENDANTS)\*

1879  
November 18.

*Wajib-ul-arz—Absent share-holders—Trust.*

*Held* that a village administration-paper which provides for the surrender to absent share-holders on their return to the village of the lands formerly held by them does not necessarily constitute a valid trust in their favour, although it may be evidence of such a trust.

Where a village administration-paper provided for the surrender to certain absent share-holders on their return to the village of the lands formerly held by them, but did not contain any declaration of a trust as existing between such absent share-holders and the occupiers of their lands at the time such administration-paper was framed, *held* that the administration-paper could not be regarded as evidence of a pre-existing trust between such persons, nor as an admission of such a trust by such occupiers.

THIS was a suit for the possession of certain land and a house situated in a certain village. The plaintiffs sued on the allegation that one Amir Chand and one Sarhu, from whom they were descended, departed from such village for a village in the Rohtak district some thirty years before the suit was brought, intrusting the property in suit to Ramjas, the father of the defendants, to be held by him on the condition that, whenever they or their children returned to the village, the property was to be restored to them : that Ramjas had accepted this trust, and had held the property subject thereto, and after his death the defendants had so held it, and had admitted the trust and caused it to be recorded at the recent settlement of the village : and that the plaintiffs having returned to the village had demanded the restoration of the property but the defendants refused to restore it. The defendants denied that the property had been made over to their father to be held in trust for Amir Chand and Sarhu and their children, alleging that their father, and they after him, had held the property in their own right, for forty years, and the right of the plaintiffs was consequently extinguished. The clause of the administration-paper, which was dated the 7th January, 1869, on which the plaintiffs relied as establishing the alleged trust, was as follows :—

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\* Second Appeal, No. 117 of 1879, from a decree of S. Melville, Esq., Judge of Meerut, dated the 5th December, 1878, reversing a decree of Munshi Ram Lal, Munsif of Ghaziabad, dated the 25th June, 1878.

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" Clause 16.—Absent share-holders : the following persons are at present absent from the village : (here follows a list of absent share-holders, the entry relating to the plaintiffs being as follows :)—

Thoke.	Absent share-holders.	Present occupier.	Period of absence.	Present residence of absent share-holder.
Thirteen biswas, Thoke of Ramjas.	H a r b h a j and Hansa sons of Amir Chand, and Dya Ram son of Sarhu, <i>Jats</i> .	Ramjas son of Amir Chand, <i>Jat</i> .	Twenty-two years.	Mauza Dhorana, pargana and Tabail Gehara, Zila Rohtak.

" Whenever the absent share-holder, or his descendants, returns and settles in the village, he shall immediately be put in possession of his property without taking any account of profit or loss : the person occupying the property shall not object to relinquish his occupation of the said property : if from any cause the share of the present occupier is transferred the property of the absent share-holder shall be held by the brother of the present occupier or by one belonging to the same stock : whenever the absent share-holder, or his descendants, returns and settles in the village, effect will be given to the above condition : if any absent share-holder is a defaulter in respect of the Government revenue, he or his descendants shall pay the same, before they become entitled to obtain possession."

The Court of first instance gave the plaintiffs a decree. On appeal by the defendants the lower appellate Court reversed this decree, and dismissed the suit.

The plaintiffs appealed to the High Court from the decree of the lower appellate Court on the grounds that the finding of that Court, that the defendants had held the property in suit adversely to the plaintiffs was directly opposed to the admission contained in the administration-paper : that according to the terms of that document the defendants were bound to surrender the property ; and that the terms of that document established conclusively the trust alleged by the plaintiffs.

Pandit *Nand Lal*, for the appellants.

The respondents did not appear.

The High Court (STUART, C. J. and SPANKIE, J.) delivered the following

JUDGMENT.—The plaintiffs, appellants, asserted that Amir Chand and Sarhu, some thirty-two years ago, made over their samin-

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dari share and a house in trust to Ramjas, the father of defendants, on condition that when they or their children returned to the village they would be allowed to re-occupy their lands : Ramjas and his successors had all along remained in possession as trustees, and had admitted the trust when the settlement papers were last revised : the plaintiffs returned in 1934, Sambat, and are heirs of Amin Chand and Sarhu, but defendants refused to surrender the share. The defendants deny that any land or house was made over to Ramjas in trust by Amin Chand and Sarhu : Ramjas and they ( defendants ) have held the property adversely to plaintiffs for forty years, and the suit was barred by limitation : Amin Chand and Sarhu owed nearly Rs. 600 to defendants, they broke down and could not pay the Government revenue : Ramjas held possession for eight years and paid it : when he asked Amin Chand and Sarhu to pay him their debt they left the village, and since then the possession of Ramjas and defendants has been adverse. The Munsif decreed the claim for the land and dismissed it for the house. He held that the administration-paper provided for re-entry. The Judge in appeal has reversed the Munsif's decree, holding that there was no satisfactory proof that Sarhu and Amin Chand intrusted their property to defendant's father Ramjas : parol evidence after such a time was not good for anything, and the administration-paper was not a proof of the trust : it recites that absentees or their descendants may on their return re-enter on their lands : the community assented to this, but any one could recall his consent : the entry is no proof that any one in possession of the share of an absentee held it as a trustee : the possession of the defendants was shown to have been adverse, and to have been so for at least twenty years.

We are not disposed to interfere. The finding as to the adverse character of the possession of defendants is one of fact. A village administration-paper does not necessarily constitute a valid trust. It might be evidence of a trust, but in this case, as regards the share in dispute, the persons entered as " absent shareholders " were neither present in the village when the settlement was in progress, nor were they assenting parties to the arrangement recorded in the administration-paper. The arrangement as to the re-entry of an absentee was made amongst the co-sharers present in the vil-



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lage ; possibly the main object in making it was to secure peaceable possession to those in occupation of the shares of absentees. In this administration-paper there is also a proviso that no owner who is a defaulter as regards Government revenue will be re-admitted until he pays up the arrears due by him. If an administration-paper containing a clause such as that before us is to be regarded as constituting a trust, it would appear to be a trust created by the share-holders of the estate, ostensibly for the benefit of absentees, though the latter really derive no present benefit from their land remaining in the possession of the share-holders in the estate, whereas the share-holders are at once benefited by taking up the shares of the absentees which they may possibly be never called upon to surrender without, as in this case, the institution of a suit. Moreover the arrangement may be one which the share-holders actually present when it is made may afterwards, if they please, revoke, or omit to record in a future settlement. However this may be, it is sufficient in this case to say that the Judge has not acted erroneously in refusing to accept the administration-paper as conclusive evidence of a trust, and we must not overlook the nature of this claim as stated in the plaint. The claim of the plaintiffs was that thirty-two years ago Amin Chand and Sarhu made over their share in trust to Ramjas, so that it is not pretended that the trust was raised by the administration-paper; that paper is relied on as evidence of the trust, and an admission by the parties who signed it that there was a trust. But there is no such admission of any actual trust as that set up by the plaintiffs. There was a long list of absentees, and amongst them are the plaintiffs, as sons of Amin Chand and Sarhu. The declaration is general that any absconding parties returning to and settling in the village shall immediately be put in possession: the occupants shall not object to relinquish their holdings. There is no declaration of any pre-existing trust as between the absentees and the occupants of their shares individually. We accept the finding of the lower appellate Court on the matter of fact that there is no evidence to establish the claim that Amin Chand and Sarhu personally intrusted their shares to Ramjas thirty-two years ago. The present appeal is therefore dismissed with costs.

*Appeal dismissed.*

## FULL BENCH.

1879  
November 28.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

**LACHMAN SINGH (PLAINTIFF) v. MOHAN AND ANOTHER (DEFENDANTS)\***

*Act X of 1877 (Civil Procedure Code), ss. 2, 13, 540—Decree—Judgment—Appeal.*

The plaintiff in this suit sued for the possession of certain land, on the ground that he was the owner thereof in virtue of a purchase from *N*. The defendants claimed such land as owners on the ground that it was included in a certain garden which they had previously purchased at a sale in the execution of a decree against *N*, and they also claimed it on the ground that they were lessees thereof under a lease from *N*, the term whereof had not expired. They also set up as a defence to the suit that it had been finally determined in a former suit between themselves and *N*, whom the plaintiff represented, that such land was included in such garden, and that consequently their title to such land as owners could not be questioned in the present suit. The Court of first instance held that such land was not included in the defendants' garden, and they were not the owners of it, but that they could not be ejected from it as they were in possession under the lease which had not expired, and that the question whether such land was included in the defendants' garden and they were the owners of it was not *res judicata*. It made a decree dismissing the suit in these terms: "Ordered, that the plaintiff's claim as it stands at present be dismissed." *Hehl* (STRAIGHT, J. dissenting) that the defendants were entitled, under s 540 of Act X of 1877, to appeal from such decree.

THIS was a reference by a Bench of the High Court composed of two Judges (Spankie, J. and Straight, J.) to the Full Bench of the High Court. The facts of the case and the point of law referred will be found stated in the judgments of the Full Bench.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Munshi *Hanuman Prasad* and Babu *Ratan Chand*, for the respondents.

The following judgments were delivered by the Full Bench:

STUART, C. J.—This is a reference to the Full Bench of the Court by a Division Bench (Spankie, J. and Straight, J.) and since it was heard the Code of Procedure, Act X of 1877, has been

\* Second Appeal, No. 46 of 1879, from a decree of R. F. Saunders, Esq., Judge of Farrukhabad, dated the 13th December, 1878, modifying a decree of Pandit Gopal Sahai, Munsif of Farrukhabad, dated the 23rd September, 1878.

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amended by Act XII of 1879 passed on the 29th July, 1879, and among other changes made by the amending Act a new definition of the term "decree" has been given. But the suit in the present case having been instituted, and the appeal having been presented, before the amending Act came into operation, the present reference must be considered according to the provisions of Act X of 1877. The point referred is the subject of the first reason of appeal, and is to the effect that the Munsif's decree shows nothing on the face of it against which the defendants could appeal to the Judge. The question was very fully argued before us, and we were much pressed with the contention that, having regard to s. 540 of the Procedure Code, Act X of 1877, and the definition of the "decree" in s. 2 of the same Code, we were to look to the decree alone, without reference to the judgment, and that, on a strict reading of the definition given of "decree" in s. 2, the decree in the present case came within the meaning of that definition, and was not appealable under s. 540, inasmuch as it was a decree which so far as it decreed anything, did so in favour of the defendants, seeing that it dismissed the suit against them, and therefore was not a decree by which these same defendants could be said to be agrieved. It appears to me, however, that such a view of the Code is too narrow, and that we may look not only into the judgment, but into the pleadings to see what the decree really means. Nor are we to confound the decretal order given at the end of the Munsif's judgment with the decree itself as actually and formally made, although the same principles of interpretation apply to both where the order or decree is in any respect ambiguous or imperfect. In the present case it is plain that the decretal order is not self-explanatory, and if we had nothing else to go upon it would be necessary, in order to its being intelligible, to read it with the judgment; and as to a decree itself in its complete form, I hold the opinion very strongly that, where it is ambiguous or imperfect as to any essential particular, it may be read with the judgment and the record. Nor is this view of the legal quality of a decree inconsistent with the definition of a decree given in s. 2 of the Code, where it is defined to mean "the formal order of the Court in which the result of the decision of the suit, or other judicial proceeding, is embodied". This definition in no

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way prevents us from looking into the judgment and record, in order to a correct understanding of the true meaning and intended application of the decree as formally drawn up. On the contrary, we are told that a decree is to embody the "result," a general term which, however, is to be particularized by reference to the decision or judgment made in the suit. These materials therefore may, if necessary, all be considered where the decree, owing to any defect or ambiguity in its terms, has to be cleared up in order to its proper enforcement. And quite consistently with these considerations s. 206 of the Code of Procedure declares that "the decree must agree with the judgment," and therefore any defect or ambiguity in the decree cannot be seen without reference to the judgment. In the present case it is with the decree and not with the decretal order that we have to deal, and that decree shows plainly that it was one of which the defendants Mohan and Hira had reason to complain as being materially unfavourable to them, and that they were therefore entitled of right to appeal against it to the Judge. The decree sets out the claim made by the plaintiff as one for possession of 3 bighas, 15½ biswas *mācāfi* land, the boundaries of the land and the names of the parties, and after decreeing 17½ biswas, being No. 79 in the record, and as to which there is no dispute, it proceeds to order that "the rest of the claim of the plaintiff be dismissed as brought, the costs of the plaintiff to the extent decreed be charged to Nawab Ahmad Husain Khan and Khuman Singh, defendants, with future interest at eight annas per cent. per mensem, that Mohan and Hira, defendants, be exempted, and their costs with future interest at eight annas per cent. per mensem be charged against the plaintiff, that the costs of Nawab Ahmad Husain Khan and Khuman Singh, defendants, be borne by themselves, and that under the circumstances of the case the defendants' pleaders' fees be separately calculated in the case". There is here not only a full recognition of the plaintiff's title as against the defendants, but the suit against Mohan and Hira is dismissed as brought, which, when we look into the judgment, we find is tantamount to a decision that their right, if any, was not as proprietors, as they had alleged, but as being in the inferior and subordinate position of lessees, and that any claim which the plaintiff had against these defendants as such lessees

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could not be entertained in the present suit, but must be made in another. Now this is not only a finding *pro tanto* against the defendants, but it is one which may injuriously affect any future proceedings on their part for the vindication of the proprietary rights they claim, for in any suit they might hereafter bring they might, according to the rulings of this Court and the Privy Council, probably be met by the plea of *res judicata* although with what effect I cannot anticipate. Strictly speaking there is in the state of things appearing on the face of the Munsif's judgment and decree no *res judicata*, but for the determination of the question as to the true nature of these defendants' rights the parties are simply, or at least by necessary implication, referred to another suit. My own opinion has always been, and is, that under such circumstances there is no room for the plea of *res judicata*, and in a case before Mr. Justice Oldfield and myself, where, as in the present case, the parties were merely referred for the determination of the matter of the plea to another suit, I expressed the opinion that the plea could not hold good (1). But it is difficult to anticipate what view may be taken of such a plea in a particular case, and undoubtedly the rulings of the Courts would go to put parties, whether plaintiffs or defendants, and pleading *res judicata* in any subsequent suit, in considerable danger; and this is a consideration which of itself goes to strengthen the defendants' right of appeal in the present case.

The case of *Ram Gholam v. Sheo Tahal* (2) was referred to on behalf of the defendants as favouring their contention as it clearly does. Reference was also made to a previous Full Bench decision of this Court, *Pan Koor v. Bhagwunt Koor* (3), where it was held that the Appellate Court should not have entertained the appeal. Particular stress was laid on my own judgment in that case. I there stated that, "for the purposes of the suit then before us, the words decree, decision, and judgment may all be taken to mean the same thing, viz. the ultimate and final determination of the matter or matters in issue between the parties". I also held that the decree in that case was not of such a nature as to entitle the defendants to appeal against it to the Judge, seeing that it was an appeal "by the defendants themselves against a decree wholly in their own favour, and the legal meaning of which is and can only be that the plaintiff's suit alto-

(1) R. A. No. 100 of 1876, decided on the 1st February, 1878, unreported. (2) I. L. R., 1 All. 266. (3) H. C. R., N.-W. P., 1874, p. 12.

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gether fails", and I ended my judgment by observing that "the decree as read by the light of the plaint is not only entirely in their favour, but is possibly beneficial to them, and their appeal therefore to the Judge was incompetent and anomalous." In the present case, however, I have shown that the decree, although apparently, and so far as it goes, favourable to the defendants, was imperfect and not self-explanatory, but that when read by the light of the record it was really unfavourable and might prove injurious to them, and that they were therefore aggrieved by it and had every interest to appeal to the Judge.

Holding this opinion and that there is nothing in the Code of Procedure to exclude the appeal from the Munsif's order to the Judge, and that the relative position of the parties in the suit, the effect of the Munsif's decree on their rights and interests, and the justice and the reasonableness of the defendants' contention, must be admitted, my opinion is that the appeal to the Judge ought to be heard. The first reason of appeal must therefore be disallowed, and the case will go back to the Bench who referred it to the Full Bench for determination of the other reasons of appeal on the merits.

SPANKIE, J.—The plaintiff, appellant, claimed possession of 3 bighas, 15½ biswas of *māufi* land in mauza Sheopat Patti, under a sale deed executed on the 2nd January, 1873, by the Nawab Ahmad Husain Khan, for the sum of Rs. 700: Mohan and Hira had, however, taken possession of the land, asserting that it formed part of the garden known as "Bakhshiwala," but it was not included in their auction-purchase, being a separate plot: the plaintiff therefore prays for possession by ejectment of the defendants Hira and Mohan. These two defendants contend that when Nawab Ahmad Husain Khan sold the land to plaintiff, he had no longer any interest in it: the lands in suit are Nos. 74, 75, and 78, and they were included in the previous purchase by defendants at auction and form part of the garden known as "Bakhshiwala." They also urged that as between the Nawab and themselves it had already been found that the land belonged to the garden, and therefore the suit was barred by s. 13, Act X of 1877, as the plaintiff claims under a deed of sale from the Nawab. The first issue laid down by the Munsif was, whether the land Nos. 74, 75, and 78 form part of the garden "Bakhshiwala" purchased by the defendants Mohan and Hira

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The second issue was, has the plaintiff a right to sue and are defendants entitled to possession by virtue of a lease. The Munsif held upon the auction-sale certificate dated 17th May, 1870, the schedule of property attached in execution of decree, dated 12th September, 1869, the copy of the sale notification dated 16th November, 1869, and the proceeding confirming the sale dated 4th March, 1870, that only the garden "Bakhshiwala" was sold, and that the land in dispute was not sold at auction. It is unnecessary here to give the Munsif's reasons for the conclusion at which he arrived. On the second issue the Munsif found that though the land in dispute had not formed part of the garden known as "Bakhshiwala" and purchased by defendants at auction, they nevertheless were in possession of it under a lease that had not expired at the time of the institution of the suit and it had not been shown that it had expired up to date. The defendants therefore could not be ejected. "They," and this is an important part of the judgment, "having acquired the rights of a lessee by payment of consideration, possess the same title which the lessee did." The Munsif also found that s. 13, Act X of 1877, did not bar the suit. The first Court in its decretal order with reference to the lands Nos. 74, 75 and 78, dismisses "the plaintiff's claim, as it stands at present," and the defendants Mohan and Hira get their costs. Both parties appealed. I need not refer to the plaintiff's appeal. The defendants Mohan and Hira contended that, as it had already in a previous suit been found as between themselves and Nawab Ahmad Husain Khan, whose representative plaintiff is, that the disputed land was a portion of the "Bakhshiwala" garden, no finding to the contrary could be made in this suit, which was barred by s. 13, Act X of 1877. It was also urged, amongst other grounds, that the evidence of the patwari and exhibits filed showed that the disputed land was a part of the garden. The Judge reversed the Munsif's decree, finding that the defendants had purchased at auction the lands in dispute. On the objection of the plaintiff the lower appellate Court also held there was an appeal in this case on the part of the defendants, because the Court below had ruled that the latter were not proprietors but lessees only. The Judge cited the case of *Ram Gholam v. Sheo Tahal* (1).

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The plaintiff appealed to this Court and his first plea is that, whereas the claim as against respondents was dismissed by the Court of first instance, the defendants, respondents, could not appeal from that decree to the lower appellate Court, whose decision was therefore bad in law. This plea led to the reference of the case to the Full Bench, the Judges of the Division Bench before whom the appeal came holding different opinions on the point, Mr. Justice Spankie holding that the Judge had been at liberty to dispose of the appeal on its merits, Mr. Justice Straight doubting whether the decree contained any matter on which the defendants could be heard in appeal.

The plea raised by appellant's pleader goes to the extent that, whereas the suit of the plaintiff was dismissed, the defendants could not appeal, and the decision of the Judge was bad in law for entertaining it. But such a plea is opposed to the very terms of s. 540 of Act X of 1877, which expressly declares that an appeal *shall* lie from the decrees or from any part of the decrees of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts. There is therefore an appeal by right from all decrees. When a decree has been prepared and signed, an appeal may at once be preferred. The form in which it is to be filed is laid down in s. 541. It can only be rejected for the reasons assigned in s. 543. Once admitted and registered it must come on for hearing. It may be dismissed under s. 551 and the judgment of the Court from whose decision the appeal has been admitted may be confirmed, without issuing notice to that Court or upon the respondent. But there is no room for the contention that the Appellate Court cannot entertain the appeal. The appellant's pleader, however, was relying on the judgment of this Court dated 24th November, 1873, *Pan Koor v. Bhagwunt Koor* (2), in which the suit was to recover possession of certain lands by setting aside a lease of them. The decree dismissed the suit, but the judgment contained a finding against the defendant as to certain items of the consideration for the lease, against which the defendant appealed, and it was held that the Appellate Court should not have entertained the appeal. I was a party to this ruling, so far that I concurred in the obser-

(2) H. O. R., N.-W. P., 1874, p. 19.



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vations of Mr. Justice Jardine on the point. It was urged in that appeal that an appeal ought not to have been entertained merely on the ground of error in the judgment when the decree was admittedly correct. In construing the language of the sections in Act VIII of 1859 regarding decrees and judgments and decisions the learned Judge observed, "It appears to me that the proper interpretation of this language is that the appeal must be strictly from the decree, that is to say, the appellant must object to the decree before he can be allowed to enter upon his detailed objections to the judgment. In effect, the appeal is equivalent to an allegation that the decree is wrong and that the reasons which led to the decree are, as stated in the lower Court's judgment, insufficient". Summed up the ruling in that case amounts to this that the appellants must be aggrieved by the decree. It was held in the particular case then before the Court that he was not so aggrieved, and the learned Chief Justice went so far as to say that, read by the light of the plaint, the decree was not only entirely in appellant's favour, but was positively beneficial to him. I am now quite ready to accept the principle that an appellant must be aggrieved by the decree. But since the ruling of this Court in 1873, Act VIII of 1859 has been repealed, and we have a new Code of Procedure. The language of the sections as to appeals, judgments, reviews of judgment, is much the same as that cited in Mr. Justice Jardine's judgment. But there are two important points of difference between the old and the new Codes, first that "judgment" and "decree" are defined by the latter, and secondly that s. 540 not only allows appeals from decrees but from any part of decrees. When this section is read with s. 2, we are in a position to put a more liberal construction on the words of the first section without going beyond the principle that an appellant must be aggrieved by the decree. "Judgment" means the statement given by the Judge as the grounds of the order or decree by which a suit or other judicial proceeding is determined. "Decree" means the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied. The decree therefore is not to be vague or shadowy: it is to have substance and body.

By s. 203, Act X of 1877, the judgment of the Court shall contain a concise statement of the case, the points for determination,

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the decision thereon, and the reasons for that decision. By s. 204, when issues have been framed, the Court shall state its finding and decision, with the reasons thereof, upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit. By s. 206 the decree must agree with the judgment, and amongst other particulars it shall specify clearly the relief granted or other determination of the suit, and in fulfilling these conditions I would say that the decree must show the finding and decision on the points for determination: otherwise it will not agree with the judgment. It is true that if the decree be found to be at variance with the judgment, or if any clerical or arithmetical error be found in it, the Court by this section can amend it, so as to bring it into conformity with the judgment, or to correct such error. The section, however, gives no power to alter or vary the decree, a review of judgment or an appeal can alone do this. But a review of judgment can only be allowed under the limitations imposed by s. 623. It could not be allowed merely to enable the Court to reconsider its judgment upon the same evidence. If therefore a party feels himself aggrieved by a decree and desires to vary, or alter or get rid of it altogether, he claims his right of appeal under s. 540. Now a decree may not contain all that it should contain, may not in fact fulfil the conditions of ss. 2 and 206 of the Act. It may in consequence of omissions operate prejudicially against one of the parties and that party may be the defendant, in a suit which is dismissed. It may be in the highest degree prejudicial to him, for since the enactment of Act X of 1877, s. 13 has widely extended the provisions of s. 2, Act VIII of 1859, and it becomes more than ever imperative to appeal from a decree in a suit, which may become final within the meaning of the section, and in which the decree by omissions or otherwise may endanger the future interests of any party. By the terms of the section no Court shall try any suit or issue in which the matter directly or substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit, between the same parties, or between parties under whom they or any of them claim, litigating under the same title. The "explanations" attached to the section very clearly show how a decree, if it does not fulfil all the conditions of the law as laid down in ss. 2 and 206, may

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prove hereafter injurious to any party to the suit. If therefore the omissions in a decree are such as to aggrieve any party, and yet are not such as can be amended by s. 206, it follows that he must appeal in order to protect his own interests, and it is perhaps possibly on this account that decrees may be appealed not only altogether but in part. For it is obvious that a person may be aggrieved by one part of a decree, though he may not be aggrieved by the remaining portion of the decree, and the remedy, admittedly, in this case is appeal. It seems to me inconsistent that there should be grounds for an appeal when the matter of the decree is prejudicial to the interests of a party, and none when the decree itself is equally injurious to a party in consequence of its omissions. I am therefore led by these considerations to conclude that a decree which is materially defective, and cannot be amended, is appealable on that ground alone, and that any party aggrieved thereby may take that objection, and in support of his objection may refer to the judgment of the Court whose decree is appealed, and this conclusion is borne out by the fact that by s. 541 an appellant not only is bound to file a copy of the decree appealed, but also a copy of the judgment, unless the Appellate Court dispenses with the latter. Now with respect to the case in which the reference has been made to us, I hold that the decree is defective, not only because it contains omissions, which, if they had been supplied, would have at once given admittedly grounds for an appeal, but because the decree itself does contain matter which laid it open to appeal. It is defective because it does not embody the result of the Court's finding on the points for determination, as both parties claimed the ownership of the lands in dispute, and the judgment declares plaintiff to be the owner and defendants merely lessees, whereas the decree is silent on the issue. The omission in this respect makes the decree injurious to the defendants because they will not be able to plead in any future suit that they were owners, as this issue in the suit was decided against them finally in the present suit, if there was no appeal, and therefore s. 13 of Act X of 1877 would be pleaded in bar of a second trial of the issue.

The decree then is open to appeal on this ground, and also because the words "the rest of the claim *as it stands at present* be dismissed," read and interpreted by the copy of the judgment filed with

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the copy of the decree, show that these words are injurious to the interests of defendants, inasmuch as they maintain the right of the plaintiff to the land as owner, though he cannot have possession at once, because the lease of defendants had not expired. These words can have no other meaning, and having that meaning the decree limits the rights of defendants to those which lessees have, and denies their right as owners, and therefore defendants may be aggrieved by the decree, assuming that they have a case to lay before the Appellate Court, and not only is their appeal in that Court entertainable but it is one that should be heard on the merits. Holding these views I maintain that the Full Bench ruling of this Court to which I was a party in 1873 (1) is not a bar to the appeal, whilst the ruling of a Division Bench in which I also was one of the Judges, *Ram Gholam v. Sheo Tahal* (2), is strictly applicable, and this latter decision is the one upon which the Judge of the lower appellate Court relied in deciding the point before him as to the admissibility of the appeal.

OLDFIELD, J.—By s. 540, Act X of 1877, “an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts.” It appears to me that the object and effect of this section are to postpone the right of appeal until the decree or formal order embodying the result of the decision of the suit or judicial proceeding has been made, and that on the decree being made, an appeal shall lie from it, as a matter of right, and since in s. 541 it is directed that the appeal shall be accompanied by a copy of the judgment (unless the Appellate Court disposes thereof), and since the decree is nothing more than the formal order embodying the result of the judgment, it seems to me a necessary consequence, and to have been the intention of the Legislature, to to give a right of objecting to the judgment, when preferring an appeal from the decree.

In the case before us I see no reason why the appeal should not be maintainable, for whether we regard the judgment or the decree the defendant is aggrieved by both. Although plaintiff's suit was dismissed, the judgment decided in favour of the plaintiff's title

(1) H. C. B., N.-W. P., 1874, p. 19.

(2) I. L. B. 1 All. 266.

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as against defendants, and the decree by its order "dismisses the suit as it stands," an order which is no proper embodiment of the judgment, and impliedly allows the plaintiff's title. The decision of this Court in *Ram Gholam v. Sheo Tahal* (1) is in point.

STRAIGHT, J.—This was a suit to obtain possession by ejectment of 3 bighas, 15½ biswas of land numbered 74, 75, 78, and 79, claimed by the plaintiff under a purchase from the defendant Ahmad Husain Khan. The sale to plaintiff was admitted by Ahmad Husain Khan, and with regard to No. 79, that may be excluded from consideration, for as to that judgment was confessed by defendant Khuman Singh. The other three portions were admittedly in the occupation of the defendants Mohan and Hira, who to the plaintiff's claim for possession set up the following pleas,—(i) That they were auction-purchasers of proprietary rights in respect of 74, 75, and 78 :—(ii) That if not purchasers of proprietary rights they were purchasers of lessee's rights. At the hearing before the Court of first instance the evidence was very fully gone into, and the following were the issues of fact that had to be decided :—(i) Whether the lands 74, 75 and 78 form part of the garden "Bakshiwala" purchased at auction by the defendants Mohan and Hira :—(ii) Has the plaintiff a right to sue and are the defendants entitled to possession by virtue of the lease. The Munsif in his judgment very exhaustively deals with these matters, and disposes of them by finding "that the defendants cannot be ejected from the lands Nos. 74, 75, and 78 owing to the term of the lease not having expired : they having acquired the right of a lessee by payment of consideration, they possess the same title the lessee did : therefore the plaintiff's suit against them is wrong." The terms of the decree are, so far as they affect the point in this case, these : "That the rest of the plaintiff's claim as it stands at present be dismissed, that the defendants Mohan and Hira be considered as exempted (from costs), that the whole of the costs with future interest at eight annas per cent. per mensem be paid by the plaintiff." Against this decision of the Munsif both the plaintiff and the defendants Mohan and Hira appealed to the lower appellate Court, the ground taken by the latter being, that the Court of first instance had wrongly disallowed their proprietary claim. On

(1) I. L. R., 1 All. 266.

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the part of the plaintiff, respondent, it was objected, that the decree of the Munsif, being in favour of the defendants they had no right of appeal, and the case could not be entertained. The Judge rejected the contention and found the defendants Mohan and Hira to be auction-purchasers of "proprietary" right, dismissing the cross appeal of the plaintiff. Against this decision the plaintiff appealed to the High Court, and the case came on to be heard before Mr. Justice Spankie and myself, when there being a difference of opinion between us upon a point of law it was referred to the Full Bench. The matter has now been very fully argued but the whole question resolves itself into this. Does an appeal lie under s. 540 of Act X of 1877 by a party to a suit, as to whom upon the face of the decree there is no adverse finding or declaration? In other words, can the terms of s. 540 "shall lie from the decree or from any part of the decrees" be so elastically construed as to justify what in the present case is practically an appeal from a judgment. No doubt the point taken for the plaintiff, respondent, is somewhat technical and I had every indisposition to entertain it, but after careful consideration and a close examination of the Act I can come to no other conclusion than that it should prevail. The expressions used in s. 540 do not appear to me to present any ambiguity, nor do the words "or form any part of the decrees" substantially alter the law as it stood in s. 332 of Act VIII of 1859, upon which the Full Bench ruling (1) of this Court was given in November, 1873. To my mind language cannot more plainly declare what an appeal is to be from. "From the *decrees* or any part of the *decrees*" I turn to the interpretation clause of the Act only to find a perfectly plain and definite description of "decree" in contradistinction to "judgment." "Judgment" means the statement given by the Judge as the *grounds of the order or decrees*. "*Decree*" means the formal order of the Court in which the result of the decision of the suit is embodied. In short, the judgment has no operative effect of itself at all and until its terms are drawn up in the decree the suit remains open. It is the decree that has effect and must be enforced, not the judgment, and what it is to contain and how it is to be expressed are provided by ss. 205 and 206 of the Procedure Code. It is altogether idle

(1) H. C. R., N.-W. P., 1874, p. 19.

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and useless for the purposes of the present case to examine, as was suggested, any proposed Bill now under consideration of the Legislative authorities for the further amendment of the Civil Procedure of this country, which may or may not hereafter prevent the recurrence of the difficulty that now arises. Language can readily be found to alter s. 540 in such a way as to give the fullest power of appeal, but while it remains as it is and the broad distinction exists between judgment and decree, to which I have already called attention, it must in my opinion be taken, that the words "an appeal shall lie from the decrees, or any part of the decrees," mean that it is the terms of the decree itself, and nothing but the terms of the decree, that are to be made the subject of appeal. The words at the end of s. 540 "to the Courts authorized to hear appeals from the decisions of those Courts," so far as the use of the expression *decision* is concerned, seem to me in no way to extend the meaning of what precede them or to have any bearing upon the construction to be applied. While feeling that the limitation which I hold to exist in s. 540, confining an appeal to the decree, is a somewhat capricious one, and involves the incongruity, that the Court of Appeal from appellate decrees might entertain matters of appeal outside the decree which could not be dealt with by the first Appellate Court, I cannot strain the interpretation of what seem to me explicit words, because as was urged hardship might arise. Nor does it appear to me that the possible operation of s. 13 of Act X of 1877 upon the defendants, respondents, had they not appealed the decision of the Court of first instance, in any after proceedings in respect of the same property, is a matter that has any relevancy to the present argument. I may, however, point out that it was competent for them under s. 206 of the Procedure Code to have had the decree put in order by the Munsif and his finding in reference to their claim duly declared upon the face of it. Had this course been adopted all difficulty would have been obviated, for then "in accordance with his judgment" (s. 205) he must have decreed them to be "lessees" and not "proprietors," which of necessity would have at once disclosed matter for appeal. Further than this, s. 13 of Act X of 1877 would under such circumstances have afterwards become applicable, had they not appealed, because a Court of competent jurisdiction would not only have "heard" but have

"*finally determined*" their claim. It was suggested in the course of the argument, that upon the face of the decree itself there was something that affected the defendants, respondents, in the words "as it stands at present," so as to afford them matter of appeal. At the hearing I was somewhat disposed to adopt the view and I wish I could do so now, as it would avoid the necessity of my differing with the rest of the Court. I cannot, however, upon further consideration see in the terms of the decree anything but a most positive finding against the plaintiff and in favour of the defendants, with their costs, and I see nothing upon the face of it giving them any ground for appeal. No doubt the decree is most carelessly and inadequately framed and is altogether out of compliance with s. 205 of the Procedure Code, but for the reasons I have already given it is the only document to be looked at for the purposes of appeal, and however full the judgment, that is ineffectual and inoperative, except so far as it finds voice and expression in the words of the decree. But to the extent it goes it deals with the plaintiff, as a non-suit would in the English Courts, and relegates him to an assertion of his rights of possession by a fresh proceeding whenever the proper moment arrives. Under all these circumstances I am of opinion that the Judge of the lower appellate Court was wrong in entertaining the defendants' respondents' appeal and that the present appeal should be allowed.

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## PRIVY COUNCIL.

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IN THE MATTER OF F. W. QUARRY.

P. C.\*  
1879

November 25.

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*Suspension of a pleader for misconduct—Act XX of 1865—Special leave to appeal.*

The High Court, acting regularly within its jurisdiction, suspended a pleader from practice for misconduct.

The Judicial Committee, not being prepared to say, from the materials before it, that the High Court's conclusion on a pure question of fact was wrong, refused to grant special leave to appeal.

It would not have followed, even if more doubt had been entertained on such a question, that an appeal would have been granted against Judges so acting.

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\* *Present* :—SIR J. W. COLVILLE, SIR B. PRADOCK, SIR M. E. SMITH, and SIR R. F. COLLIER,



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IN THE MAT-  
TER OF F. W.  
QUARRY.

THIS was a petition presented by Mr. F. W. Quarry, a pleader admitted in the High Court of the North-Western Provinces in 1871, for special leave to appeal against an order of that Court, dated 3rd April, 1879, suspending him from practice for three months for misconduct as a pleader.

Mr. J. Graham was heard for the petitioner.

Their Lordships' judgment was delivered by

SIR J. W. COLVILLE.—This is an appeal made to the discretionary power of the Court to grant special leave to appeal against an order of the High Court dated as long ago as the 3rd of April, 1879, whereby the petitioner was suspended for three months from practising as a vakil. The period of suspension has obviously expired considerably before the time at which this application is made, and that in itself forms some ground why their Lordships should not accede to the application. Their Lordships, however, do not mean to go so far as to say that, if the effect of the order had been to inflict upon the character of the applicant a lasting stigma, and there had been a clear miscarriage of justice shown, the fact that the period of suspension had expired would alone have induced them to refuse this application. But it appears to their Lordships after hearing the statement at the bar, and reading the proceedings which have been filed in support of the application, that the Court below acted within its jurisdiction; that upon the complaint of Mr. Bullock, the Judge of the Small Cause Court, they formulated certain charges, charges which, if substantiated, would have justified their order, that a rule to show cause was served upon the applicant, that he put in his answer, that there were affidavits filed on both sides, that the Court heard both parties, and having heard both parties made the order which is now complained of. Their Lordships think that the Court acted within its jurisdiction when they found upon the evidence that ground was made out upon which the rule should be made absolute, or rather that enough had been made out to justify them in suspending the applicant for the time for which they did suspend him from practice, and, so far as their Lordships can judge from the materials before them, they are not prepared to say that this was not a right conclusion. It would not have followed, even

If their Lordships had entertained more doubt on the subject, that they would have granted an appeal against Judges acting regularly within their jurisdiction upon a pure question of fact. The application must therefore be refused.

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QUAR. T.

Agents for the petitioner : Messrs. Carpenter & Son.

## APPELLATE CIVIL.

1879  
December 1.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

**MUNIA AND OTHERS (DEFENDANTS) v. BALAK RAM (PLAINTIFF).\***

*Certificate to collect debts—Act XXVII of 1860—Alienation of the Estate of a deceased person for the payment of his Debts—Succession.*

Where a person to whom a certificate had been granted under Act XXVII of 1860 to collect the debts due to the estate of a deceased Hindu, but who had no share or interest in such estate, contracted a debt for the purpose of paying debts due from such estate, and charged such estate with the payment of such debt, held that the creditor could not by virtue of the acts of such person claim to recover the moneys advanced by him to such person from the heirs and estate of the deceased, even though such moneys had been applied to the liquidation of the debts of the deceased.

ONE Janki applied, as the widow of one Bisram, deceased, to the District Court of Cawnpore for a certificate under Act XXVII of 1860 to collect the debts due to Bisram's estate. This application was opposed by one Munia and one Lachminia, claiming to be the daughters of Bisram, on the ground that Janki had no right to the certificate, having been the concubine and not the wife of Bisram. The District Court allowed Janki's application on the 28th July, 1876, and granted her a certificate on the 12th December, 1876, empowering her to collect the debts due to Bisram's estate. In the meantime, on the 6th September, 1876, Janki, as the widow of Bisram and heir in possession of his estate, gave one Balak Ram a bond for Rs. 1,901, in which she mortgaged a portion of Bisram's real estate as collateral security for the payment of such money. This bond recited that the money was borrowed with the object of paying the debts due from the estate of Bisram. On the

\* Second Appeal, No. 618 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 25th February, 1879, modifying a decree of Babu Abinash Chandar Banarji, Subordinate Judge of Cawnpore, dated the 17th June, 1873.

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20th March, 1877, Munia and Lachminia, who had sued Janki to set aside the certificate granted to her and to establish their own right to a certificate, obtained a decree setting aside the certificate granted to Janki. In February, 1878, Balak Ram sued Janki, Munia, and Lachminia on the bond of the 6th September, 1876, claiming to recover the debt due thereunder from the defendants personally and by the sale of the mortgaged property. The defendants Munia and Lachminia set up as a defence to the suit, amongst other things, that Janki was not the widow of Bisram and she had therefore no right of inheritance in his property and was not competent to mortgage it, and further that she was not competent to mortgage the property in virtue of the certificate granted to her under Act XXVII of 1860, which moreover had been granted to her subsequently to the mortgage.

The Court of first instance held that Janki, not being the widow of Bisram or his heir, was not competent to mortgage his property, and further that she was not competent to mortgage it in virtue of the certificate granted to her under Act XXVII of 1860. It also held that, under the circumstances, the fact that a debt of Rs. 900, due from the estate of Bisram to one Badri Das, was paid out of the money advanced to Janki on the mortgage did not make Munia or Lachminia, or the property of Bisram, liable for the money so advanced. It observed on this point as follows:—  
“ I hold that a stranger cannot take upon himself to pay another’s debts without his consent and make him liable to himself by making such payments: the plaintiff had no business to pay the debts of Bisram without the consent of his daughters, who were his real and proper heirs: it is not denied that their consent was not taken by the plaintiff: the plaintiff cannot therefore make the daughters of Bisram liable for this debt: for the same reasons Bisram’s property of which those daughters were owners is not liable for this debt: the principle of *caveat emptor* applies: the plaintiff got the property mortgaged to him by a person who had no right to mortgage it: he made a voluntary payment without any consideration: it was an officious act on his part to pay debts due not by him or his mortgagor but by other persons, and he has no legal right to enforce the liability of that act against those persons: I hold therefore that the plaintiff cannot get a decree against the daughters or the pro-

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perty of Bisram, but he should get a decree against the person of Janki." On appeal by the plaintiff the lower appellate Court modified the decree of the Court of first instance, giving the plaintiff a decree against all the defendants and against the mortgaged property. The Court observed :—"She (Janki) had been to all intents and purposes the wife of Bisram, although not married to him, and, holding a recognised position in his house for many years, she was competent to so administer his affairs as to clear them from the debts of their deceased owner : the discharge of Badri Das' money-claim was a primary and obligatory charge on the estate; the period of his loan for Rs. 500 was two years; contracted in July, 1874, its time for payment was up in July, 1876, but it could not be paid off without incurring a fresh loan, which was accordingly done with appellant in September, 1876: Badri Das admits the receipt of the money and return of the mortgage-bonds, and because Janki took the opportunity to include other necessary charges in her transaction with appellant, she cannot be held to blame, morally or legally: the money so raised was not for her personal benefit but to benefit the estate of Bisram, and, until her power to incur the fresh debt was revoked by competent authority, she must be held to have been acting within the power conferred by the certificate granted in July, 1876: moreover it is not proved there has been any waste or misappropriation by Janki: the debt incurred by her should therefore be borne by the estate and the persons for whose benefit the act was done : s. 4, Act XXVII of 1860, affords full indemnity to debtors paying debts to the person in whose favour a certificate has been granted, the certificate being conclusive of the representative's title against all debtors of the deceased person : the presumption is that, since the certificate-holder has the power to receive moneys in discharge of debts, his right to pay them is equally good : the appellant refers to the precedent ruling of the High Court, *Hasan Ali v. Mehdi Husain* (1), where a sale by a female certificate-holder was found to be binding upon the minors for whose benefit it was effected, being valid under the Muhammadan law, and in accordance with justice, equity, and good conscience, the property having been sold in good faith and for valuable consideration to liquidate ancestral debts and to meet

(1) I. L. R., 1 All. 533.

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other necessary purposes and wants of the certificate-holder and the minors: although that precedent has reference to Muham. madan parties, the principles are equally applicable to Hindus, among whom the payment of debts is one of the first charges incumbent upon inheritors: the Contract Act, IX of 1872, s. 69, also authorises the re-imbursement to a person paying money for another in the payment of which he is interested: at the time of payment of Badri Das' claims both Janki and Munia and her sister were interested, the subsequent decretal order of March, 1879, recognizing a better right to inherit on the part of Munia and her sister does not alter the case, nor lessen or remove the liability of Munia and her sister, as inheritors, to pay the appellant's money-claim conjointly with Janki, who has also separately appealed against the order which fixes the liability solely upon her."

Munia and Lachminia appealed to the High Court, contending that Janki was not competent to mortgage the property of Bisram, being his concubine and not his widow, that being a stranger her acts could not bind the defendants, the lawful heirs of Bisram, and the certificate granted under Act XXVII of 1860 to her did not give her authority to mortgage.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.

The judgment of the Court (PEARSON, J. and OLDFIELD, J.) was delivered by

PEARSON, J.—In our judgment all the grounds of appeal are valid and must be allowed. The reasons for which the Court of first instance exempted the daughters and the estate of the deceased Bisram from liability to the plaintiff's claim were sound and incontrovertible; while those assigned by the lower appellate Court for decreeing the claim against the appellants and the mortgaged property are untenable. Musammat Janki was not one of Bisram's heirs; she had no share or interest in the estate left by him; and she was wholly incompetent to contract debts even for the purpose of paying debts for which that estate may have been liable; and still less was she justified in creating a charge or lien on that estate. The plaintiff cannot therefore by virtue of acts done by her claim to

recover moneys advanced by him to her, even though they may have been applied to the liquidation of Bishram's debts, from his daughters and estate. Accordingly we reverse the lower appellate Court's decree in so far as it modifies the Subordinate Judge's decree, and affirm the latter in its entirety. The costs of the appeal are awarded to the appellants.

*Appeal allowed.*

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1879  
December 5.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

**PREM SUKH DAS AND OTHERS (PLAINTIFFS) v. BHUPIA AND ANOTHER (DEFENDANTS).\***

*Landlord and Tenant—Non-payment of rent—Adverse possession—Limitation.*

The plaintiffs in this suit, alleging that S through whom they claimed had given B, who was represented by the defendants, in July, 1828, the lease of a certain house on the condition that B should pay a certain annual rent for such house, and, if he failed to pay such rent, that he should vacate the house, such condition being contained in a *keraiya-nama* executed by B in S's favour, sued the defendants for the rent of such house for two years, and for possession of the same, alleging the breach of such condition.

*Held* (SPANKIE, J., dissenting) that, supposing that a tenancy had arisen in the manner alleged, the mere non-payment of rent by the defendants for twelve years prior to the institution of the suit would not suffice to establish that the tenancy had determined, and that the defendants had obtained a title by adverse possession, so as to defeat the claim; for if once the relation of landlord and tenant were established, it was for defendants to establish its determination by affirmative proof, over and above the mere failure to pay rent.

THE plaint in this case stated that on the 6th July, 1828, Sital Das, through whom the plaintiffs claimed, had leased a certain house of which he was the proprietor to one Balwa Bhona, who was represented by the defendants, on the following condition, *viz.*, that Balwa Bhona should either provide for the performance of eight days' work yearly as rent, or should pay him rent in coin at the rate of one rupee per annum, and that if Balwa Bhona failed to perform this condition he should vacate the house. The plaint further stated that rent from the 6th July, 1875, to the 5th July,

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\* Appeal under cl. 10, Letters Patent, No. 4 of 1879.

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1877, was due from the defendants, and the plaintiffs claimed to recover Rs. 2 from defendants as the rent for two years, and possession of the house. The condition to which the plaintiffs referred was contained in an instrument in writing styled a *keraia-nama*, dated the 6th July, 1828, which Balwa Bbona had executed in favour of Sital Das on becoming his tenant. The defendants set up as a defence to the suit, *inter alia*, that, as they had not paid rent for upwards of twelve years, they had acquired adverse possession of the house and the plaintiffs were not entitled to rent or to eject them. The Court of first instance, finding as a fact that the defendants had not paid rent for the house for more than twelve years, held that defendants had acquired adverse possession of the house, and the plaintiffs were not entitled to rent or to eject them. On appeal the lower appellate Court concurred in this ruling of the Court of first instance.

The plaintiffs appealed to the High Court, contending that, under the terms of the *keraia-nama*, the defendants were liable to be ejected, and that mere non-payment of rent did not deprive the plaintiffs of their right to recover rent or to eject the defendants on the occasion of non-payment of rent. The appeal came for hearing before Pearson, J., and Spankie, J., who, differing in opinion, delivered the following judgments:

PEARSON, J.—The claim in this suit is based on a *keraia-nama*, dated 6th July, 1828. In so far as the vacation of the houses in question is claimed in accordance with the condition stated in that document, the suit appears to be one for specific performance of a contract, to which art. 113, sch. ii, Act XV of 1877, is applicable. Neither of the lower Courts has, however, tried the material issue whether the defendants are bound by the *keraia-nama* aforesaid. If they are in possession of the houses under the instrument, their possession cannot be held to have been adverse merely because they may not have paid rent within twelve years. The plaintiffs' claim for rent for the years for which it is claimed appears to be within the time allowed by art. 110, sch. ii of the Limitation Law aforesaid. Whether the claim to enforce the condition relating to the vacation of the houses be within the time allowed under the terms of art. 113 may be matter for inquiry and determination.

Setting aside the decrees of the lower Courts, I would remand the case for fresh disposal to the Court of first instance, with an instruction that the costs of this appeal shall follow the event and be costs in the cause.

**SPANKIE, J.**—I cannot regard the suit as one for the specific performance of a contract, and if it could be so regarded, it would be barred by lapse of time, for we must accept the finding of the Courts below that no rent has been paid for upwards of twelve years prior to the institution of the claim. Under these circumstances the plaintiff must have had notice that the performance of the contract was refused, and he should have brought his suit within three years from the first default.

But the claim does not profess to be one for specific performance of a contract. It assumes that the conditions of the lease have been fulfilled up to the 6th July, 1875, and asks for the amount due in cash at the rate of two annas for each of the labourers that defendants should have supplied under the terms of the deed of 1828, and also for possession. The defendants totally repudiate the proprietary title of plaintiffs, and deny that any rent was ever paid by themselves or predecessors to plaintiffs, and allege that they have all along held proprietary possession of the house.

We cannot in a second appeal question the finding of fact that the rent has not been paid for upwards of twelve years prior to the institution of the suit. This being so, it appears to me that a claim now to enforce the terms of an instrument written in 1828, which it is shown have not been enforced for upwards of twelve years prior to the institution of the suit, is barred, and should be dismissed. I would dismiss the appeal and affirm the judgment with costs.

The plaintiffs appealed to the Full Bench, under cl. 10, Letters Patent, against the judgment of Spankie, J.

*Babu Oprokash Chandar Mukarji*, for the appellants.

*Munshi Hanuman Prasad* and *Shah Asad Ali*, for the respondents.

The following judgments were delivered by the Full Bench :

**OLDFIELD, J. (STUART, C. J., PEARSON, J., and STRAIGHT, J. concurring)**—This is a suit to recover two years rent of a certain house from the defendants and to eject them from the premises.

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The plaintiffs' case is that under a deed of lease, dated 6th July, 1828, their ancestors leased the house to defendants' ancestors on the following terms, that the latter should supply annually eight labourers to the lessor or should pay a sum of two annas in lieu of supplying each labourer, and on failure to comply with the terms should be liable to be evicted from the premises. The answer of the defendants is that the house was built by their ancestors and has always been held by them in proprietary right, and that the deed of 6th July, 1828, on which plaintiffs rely, is a forgery. The Court of first instance, after remarking that no doubt the defendants' ancestors were located by those of plaintiffs, finds that there has been no payment of rent within twelve years, and relying on this fact has concluded that their possession has been adverse and has dismissed the claim. The Judge has affirmed the decree: he remarks that "there is evidence to show that the defendant or his predecessors, in times not long ago, acknowledged that he was the plaintiff's ryot and had been originally located there by the plaintiff's ancestor, Sital, and whatever may be the dependency of a ryot on his lord I think clearly exists between the plaintiff and defendant here: probably the land is still the plaintiff's and cannot be diverted to other purposes or sold by the defendant without the consent of the plaintiff, and there probably the plaintiff's interest and power end, but that plaintiff has a right to eject or take rent is not proved, and the long tenure of defendant without rent is now equivalent to a good title to hold without payment of rent."

Neither of these judgments amounts to an adequate finding on the question of tenancy, or disposes of the real question at issue whether or not the defendants' ancestors became tenants of the plaintiffs' ancestors under the deed set up by the plaintiffs, dated 6th July, 1828, and so became liable to the payment of rent and to eviction as averred. This question has not been touched on, nor has the genuineness or otherwise of the deed been even alluded to, and supposing that a tenancy did arise in the manner contended for, the Courts are in error in supposing the mere non-payment of rent for a period of twelve years will suffice to establish that it has been determined, and that defendants have obtained a title by adverse possession, so as to defeat the claim, for once the relation of landlord and tenant has been proved, it is for the latter to establish its cessation by affirmative proof, over and above the

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P. R. M. S. K. H.  
D. A. S.  
B. H. U. P. L. A.

mere failure to pay rent. The Courts have in the present suit to decide whether the deed produced by plaintiffs is genuine, and established a tenancy on the part of defendants' ancestors, on the terms alleged, and if so whether defendants have shown that the tenancy has determined, and that they have held for twelve years since its determination. If these questions are decided in plaintiffs' favour they are entitled to succeed. We are of opinion that the appeal must prevail and that a decree should pass in the terms of Mr. Justice Pearson's proposed order.

SPANKIE, J.—It will be seen from the pleas in appeal from the Judge's decision to this Court that it is assumed that the relation of landlord and tenant exists under the lease: secondly, that the Judge had not determined whether defendants paid or did not pay rent to plaintiffs, nor had he considered the admission of defendants that they were tenants: thirdly, admitting defendants did not pay rent for some time still the right to receive it cannot be destroyed. In second appeal we had to confine ourselves to these pleas and no others. It is erroneous to assume that the relation of landlord and tenant exists or was admitted as regards the *houses*. The lease itself refers to thatched and mud-built houses hired to the defendants. But the first Court found that the *houses* had been constructed entirely by the ancestors of defendants, though these ancestors had been located on the *land* by the ancestor of plaintiffs. The plaintiffs sued for rent under the lease, averring that it had been paid up to 1875. This the plaintiffs were bound to establish, and it was in issue whether they were entitled to recover possession of the houses in virtue of their proprietary right and the rent claimed by them, or whether, no rent having been paid to them within the twelve years prior to the institution of the suit, they had lost their proprietary right. The first Court found that the plaintiffs had never received the rent within twelve years prior to the institution of the suit: the defendants had repudiated the proprietary title of plaintiffs in the house. The first Court also found that defendants had held adversely to plaintiffs for more than twelve years prior to the institution of the suit. The second Court appeared to me to accept the judgment of the first Court "that defendants had held over twelve years adverse possession and therefore had acquired a title against plaintiffs."

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It seems to me that the rest of the judgment of the lower appellate Court has been misunderstood. The Judge refers to the original location on the *land* of the persons who constructed the houses which formed the *sarai*, and in his view, only so far as the land is concerned is there any connection between the plaintiff and defendant as landlord and ryot. "Probably," observes the Judge, "the land is still the plaintiff's and cannot be diverted to other purposes or sold by the defendant without the consent of the plaintiff, and there probably the plaintiff's interest and power end." But the Judge holds the right to take rent or eject the defendants not proved, and that defendants have acquired a good title by long tenure to hold without payment of rent.

When then the first plea before us in second appeal referred to the lease of 1823, and the second to the payment of rent and the admission made by defendant that he was a tenant and paid rent, it appeared to me that the Judge had disposed practically of both these pleas in the finding at which he arrived, and that after such a finding no claim brought under the lease could be enforced. The plaintiff's allegation and averment that he had received rent under the lease up to 1875 had broken down, and the lease had never been in operation, certainly for twelve years prior to the institution of the suit. The Judge and Court below him also found that the defendants had acquired a title against plaintiffs by continuous occupation for a very long period without payment of rent, asserting their own proprietary possession as regards the house. Under these circumstances the lease, having never been enforced within twelve years prior to the institution of the suit, could not be enforced now, and I thought that the suit as brought failed and was therefore properly dismissed, and I think so now and would dismiss the appeal.

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December 16.

## CRIMINAL JURISDICTION.

*Before Sir Robert Stuart, Kt., Chief Justice.*

EMPRESS OF INDIA v. FOX.

*Culpable Homicide not amounting to murder—Voluntarily causing Hurt—Spleen disease—Act XLV of 1860 (Penal Code), ss. 299, 304, 321, 323,*

Where a person hurt another, who was suffering from spleen disease, intentionally, but without the intention of causing death, or causing such bodily injury as was

likely to cause death, or the knowledge that he was likely by his act to cause death, and by his act caused the death of such other person, held that he was properly convicted under s. 323 of the Indian Penal Code of voluntarily causing hurt.

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This was a case called for by the High Court under s. 294 of Act X of 1872. The facts of the case are sufficiently stated in the order of the High Court.

Mr. Chatterji, for the accused.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

STUART, C. J.—This case was first brought to the notice of the Court by a letter from the Government of these Provinces, dated the 11th November last, in which letter it was inquired “whether in the opinion of the High Court the judgment of the Magistrate was legal and equitable.” On reading this letter it occurred to me that, instead of returning an answer to it in the same form, it would be better for the Court to take judicial cognizance of it and to dispose of it under s. 297 of the Criminal Procedure Code. That course was adopted and the record sent for. I should state that I adopted this course of action in order to avoid the discussion and inconvenience experienced by the Government and by this Court in the well-known *Fuller's Case*, and also in order to avoid the suggestion that was made in that case that the Court, although consulted by the Government in its judicial capacity, had not heard and determined the matter in the usual way, but simply by letter in reply to the Government.

The case has now according to the course of the Court come on for hearing and disposal by myself, both prosecutor and accused being professionally represented, the Government by Babu Dwarka Nath Banarji, the Junior Government Pleader, and the accused by Mr. Chatterji, barrister and advocate of this Court. Both these gentlemen submitted their arguments very fairly, although it did not appear that there was any serious difference between them as to the legal aspect of the case. I have very carefully considered all that they advanced, and I have also very anxiously perused and examined the evidence, and I have arrived very clearly at the conclusion that, in the first place, the conviction of Fox under s. 323 of the Indian Penal Code was right, and that the sentence of a

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fine of Rs. 200, or, in default, one month's rigorous imprisonment, was one which it was within the discretion of the Magistrate to order, although I myself would have been satisfied with a penalty of less severity. But the fine has I believe been paid, and under all the circumstances of the case I am not disposed to interfere with the sentence by reducing it now.

I observe it is suggested in the police report that the offence was one under s. 304 of the Indian Penal Code, *vis.*, culpable homicide not amounting to murder, that is, homicide committed without premeditation. But in order to a conviction under such a charge, it is incumbent on the prosecutor to prove that the assault or blow which caused death was committed or inflicted so recklessly as to show that the offender was utterly regardless of the consequences of his act. But in the present case the evidence falls considerably short of such a degree of criminality: it simply amounts to this, that very early on the morning of the 30th August last Fox, dissatisfied and irritated by the lazy and inefficient manner in which the punkha cooly Tulsia was managing the punkha, pulling it slowly and nodding in a sleepy manner while doing so, went up to him and struck him one or more blows, on what part of his person does not very clearly appear, whether on the head or on the side, or other part. One thing however is clear, and is not disputed, that Tulsia's death was the result of the injuries he had so received. But on a fair view of the evidence it would in my view be unreasonable to hold that Fox was actuated by the reckless vindictiveness contemplated by s. 304. He simply under a feeling of annoyance at the inefficient manner the punkha was being pulled by Tulsia, and under what may be called a sudden impulse, struck him in the way described. The blows were not heavy or severe, and if Tulsia had been in a healthy condition of body, it is probable that he would not have materially suffered from them, But he was not in a healthy state. The evidence of Doctor Hilson shows that his spleen was in a very diseased condition, more than double the natural size, and thus the weakness of the poor man and his so quickly succumbing is explained. And I observe that the police report which states Fox's offence as one falling under s. 304, Indian Penal Code (culpable homicide not amounting to murder), yet strangely admits that Fox "had only seen the deceased for the first time on the morning he struck him (30th

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August), as before that he was serving with Sergeant Justice of the Government Railway Police". Doubtless the blow or blows accelerated Tulsia's death, but that such a result was contemplated or was carelessly disregarded by Fox as possible, it is in my opinion on the evidence impossible to believe. Fox appears merely to have acted from a sudden feeling of annoyance, and to have vented that feeling by an assault, which on a healthy person would have been attended with no injurious consequences

I cannot conclude this judgment without noticing the allusion the Magistrate makes to the recorded opinion of the Court in *Fuller's Case*. He refers to paragraphs 17 and 18 of the Court's letter in that case, which deal with the procedure which it is the duty of a Magistrate to follow. But I may be permitted to refer to other portions of that same letter and of my own minute which appear to me very clearly to expound the law to be applied to the present case. In paragraph 24 of the Court's letter in *Fuller's Case* it is stated that "By the law of India, as by the law of England, a person causing bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby *accelerating* the death of that other, is deemed to have 'caused his death'. Nevertheless, every causing of death does not amount to the offence of culpable homicide. Unless it be proved that a person who has caused the death of another caused death with the intention—(i) to cause death; (ii) to cause bodily injury likely to cause death; (iii) to cause bodily injury as he knew to be likely to cause death to the person to whom the harm is done; or (iv) to cause bodily injury to any person sufficient in the ordinary course of nature to cause death with the knowledge (v) that he was likely by his act to cause death; or (vi) that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death—the person who has caused death cannot by the law of India be convicted of culpable homicide of either description". And in paragraph 25 of the letter it is explained:—"Nor can a person be convicted of the offence of *voluntarily* causing grievous hurt, unless it be proved that he caused one of the descriptions of hurt defined in the Code as grievous hurt, either by means whereby he intended to cause such hurt, or by means which at the time of employing those means he knew or had reason to believe to be likely to

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cause it (Indian Penal Code, section 39).” And the Court then goes on to remark in paragraph 26 that “in Fuller’s case there was no evidence that he had committed any of the kinds of hurt defined in the Code as grievous hurt; and although a person is by law presumed to know and to intend the ordinary and probable result of his acts, the result could hardly be declared ordinary or probable; while the circumstances rebutted the presumption of intention or knowledge to commit either culpable homicide or grievous hurt.” The same principle as to motive and intention is also explained in my own minute in *Fuller’s Case*. In paragraph 23 of that paper I say, “It would appear from the medical evidence that the spleen of the deceased was in such a diseased state that very slight violence, either from a blow or fall, would have been sufficient to have caused death. Indeed, it is plain that a mere accident to the man, such as his tripping while walking or running, might have had this fatal result; but that there is nothing in the case to show that such extreme and perilous sensibility of body was known to, or could have been reasonably suspected by, Mr. Fuller; and *his guilt or criminal responsibility would have been the same, and neither more nor less, if Kathwaru had not died*. The letter of the Government of India goes on to state that ‘the death of Kathwaru was the direct result of the violence used towards him by Mr. Fuller’, and His Excellency in Council observes that ‘the High Court assumes the connection between the two events as being clear’, but adding ‘yet, on reading Mr. Leeds’ judgment, he does not find that gentleman ever considered the effect, or even the evidence of this connection’. The portion of the Court’s letter (i.e. the Court’s first letter to the Local Government) thus referred to is in these terms:—‘The medical evidence shows that the spleen was in a diseased condition; that death was caused by the rupture of the spleen; that this injury might have been caused by moderate violence or by a fall; and that there were no external marks of injury on the body. Under these circumstances, it appears that no great violence was used, and that the accused neither contemplated nor could have foreseen that severe hurt would have resulted from the degree of violence exerted by him, much less that it should have been followed by the lamentable result of death’. It will be observed that Mr. Fuller’s not very violent blow and Kathwaru’s death are here stated as connected facts,

but not in such a way as to show Mr. Fuller's culpability in regard to the death. In fact, it is unnecessary to dwell on the mere fact of the connection between the two circumstances, *the material and vital question being, not whether the death did in fact result from the blow, but whether Mr. Fuller had such a guilty knowledge of the probable consequences as to make him really responsible for the fatal occurrence.* But there is nothing in the record to show any such guilty knowledge on his part or that he intended to occasion a hurt which would ordinarily or probably cause death, and every circumstance ought to have been distinctly proved, and not left to any kind of inference or suspicion." And with respect to Mr. Leeds' judgment I observed "that it distinctly states the fact of the blow or assault, as it may be called, and also Kathwaru's ultimate death, but it does not state, and, with great respect and deference, I submit it very properly does not state, these as necessarily connected facts against Mr. Fuller in the way of measuring his culpability."

The law thus laid down appears to me exactly to apply to the present case. It is impossible to conclude that Fox could have had in view the cooly's death as a probable or even possible consequence of his acts, and the measure of his culpability is therefore not that fatal result, but only the blows themselves, inflicted, as these were, suddenly, under an impulse momentarily excited and not arising from any actual malice against the man.

## APPELLATE CIVIL.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

PHUL KUAR (PLAINTIFF) v. MURLI DHAR AND ANOTHER (DEFENDANTS)\*

*Mortgage—Usufructuary mortgage—Hypothecation—Suit for money charged on immoveable property.*

*M and S executed an instrument in favour of K and G in the following terms: "We, M and S, declare that we have mortgaged a house situated in Ghaziabad, owned and possessed by us, for Rs. 300, to K and G, for two years: that we have received the mortgage-money, and nothing is due to us: that we have put the mortgagees in possession of the mortgaged property: that eight annas has been*

\* Second Appeal, No. 1260 of 1878, from a decree of R. M. King, Esq., Judge of Meerut, dated the 6th September, 1878, affirming a decree of Munshi Ram Lal, Munsif of Ghaziabad, dated the 16th May, 1878.



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fixed as the monthly interest, in addition to the rent of the house, which we shall pay from our own pockets : that we promise to pay the aforesaid sum to the mortgagees within two years, and redeem the mortgaged property : that if we fail to pay the mortgage-money within two years, the mortgagees shall be at liberty to recover the mortgage-money in any manner they please."

*Held per* STUART, C. J., OLDFIELD, J., and STRAIGHT, J., (SPANKIE, J. dissenting), in a suit upon this instrument to recover the principal sum advanced by the sale of the house, that the instrument created a mortgage of the house as security for the payment of such principal sum. *Dulli v. Bahadur* (1) distinguished.

THE plaintiff in this suit, which was instituted in the Court of the Munsif of Gháziabad, in April 1878, claimed "to recover Rs. 300, the principal amount of the mortgage-money, besides the rent of the mortgaged house, at eight annas a month, under the terms of the mortgage-deed, and Rs. 70-9-0 on account of interest from the date of ejectment up to the date of suit, at the rate of one per cent per mensem, in all Rs 427-1-6, by the auction-sale of the mortgaged house situated in the town of Gháziabad, under the mortgage-deed dated the 6th November, 1868" The plaintiff stated that the defendants had borrowed Rs. 300 from her deceased husband at mauza Lalyana, and executed a deed of mortgage on the 6th November, 1868, in which they mortgaged their house at Gháziabad : that it was stipulated in that deed that the mortgagee should remain in possession of the house for two years, on the expiry of which period the mortgage-money should be repaid to the mortgagee : that accordingly she held possession of the house for two years, and that on the 24th April, 1876, the defendants dispossessed her. The defendants set up as a defence to the suit, amongst other things, that the instrument of the 6th November, 1868, created no mortgage of the house, and the plaintiff's claim being consequently reduced to one merely for money, the suit was not cognizable by the Munsif but by the Court of Small Causes at Meerut. That instrument was in the following terms :—"We, Murlidhar and Sagar Mal, sons of Ram Lal, do hereby declare that we have mortgaged a house situate in Gháziabad, bounded as below, owned and possessed by us, in lieu of Rs. 300, half of which is Rs. 150, to Kashi Ram and Ganga Ram for two years : that we have received the entire mortgage-amount from the mortgagee, and nothing remains due : that we have put the mortgagee in possession of the thing mortgaged like ourselves: that eight annas has been fixed as monthly

(1) H. C. R., N.-W. P., 1875, p. 55.

interest besides the rent of the house, which we shall pay from our own pocket: that we agree that we shall pay the aforesaid sum in a period of two years to the mortgagee and get the thing mortgaged redeemed: that if we fail to pay the mortgage-amount within the period of two years, the mortgagee shall be at liberty to recover the mortgage-amount in any way he pleases: that whatever is laid out by the mortgagee in repairing the house shall be paid by us at the time of redemption of mortgage: hence these few presents have been executed by way of a mortgage-deed to serve as evidence." The Munsif allowed the contention of the defendants and dismissed the suit. On appeal by the plaintiff the lower appellate Court also allowed this contention.

The plaintiff appealed to the High Court contending that the instrument of the 6th November, 1868, created a mortgage of the house and the suit was therefore cognizable by the Munsif. The appeal was heard by a Division Bench of the High Court composed of Stuart, C. J. and Spankie, J.

Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mukarji*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondents.

The following judgments were delivered by the Judges of the Division Bench :

STUART, C. J.—In this case it was objected by the defendants respondents, and both the lower Courts have held, that the claim is one cognizable by a Small Cause Court, and that the Civil Court had no jurisdiction to entertain the case, seeing that, in their opinion, possession of the house for two years, as conditioned by the deed, does not confer such a mortgage-right as would entitle the mortgagee to realize the amount under it from the property. All that the mortgagee is entitled to sue for is Rs. 300, and for that purpose she ought to proceed in the Small Cause Court. On the other hand it is contended by the plaintiff, appellant, that there is a good mortgage of the house to her, and her plaint shows that she has brought the suit for recovery of the Rs. 300, which is the mortgage-money, and interest, besides the rent, by auc-

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tion-sale of the mortgaged house, and that the suit is therefore cognizable by the Munsif and not by the Small Cause Court. This is her only plea, and it is the sole question before us in this appeal. The following is the mortgage-deed :—(After setting out the deed of mortgage, the judgment continued) :—If the first part of this deed stood by itself without reference to any thing that was to follow, it might perhaps be fairly argued that what was really mortgaged was not the house itself, but only two years' use of it. But even if so, there was a mortgage, a limited mortgage, and such a transaction is not within the terms of s. 6 of Act XI of 1865. Taken as a whole, however, the transaction bears a wider aspect, for it states that the mortgagors "have put the mortgagee in possession of the thing mortgaged like ourselves," and it goes on to provide, "that we agree", i.e., we intend and promise, "that we shall pay the aforesaid sum in a period of two years and get", i.e., the mortgage-debt being then paid, we shall then get, "the thing mortgaged redeemed," and then comes a very important clause showing that the contingency of the debt not being paid within two years was kept in view, for it provided that, "if we fail to pay the mortgage-amount within the period of two years, the mortgagee shall be at liberty to recover the mortgage-amount in any way he pleases," that is, he may either proceed against the mortgaged property or against the mortgagor personally, and it is added that, whatever is laid out by the mortgagee in repairing the house "shall be paid by us," not at the end of two years, but "at the time of redemption of mortgage."

It is, therefore, quite clear to me that the deed is an ordinary simple mortgage-deed, by which the mortgagor's house in Ghaziabad is pledged as security for the mortgage-debt, the condition as to payment of the amount within two years pointing to a mere contingency as to the mortgagor's intentions, but in no way altering the legal character of the mortgagee's right under his deed. The precedent referred to by the Judge—*Dulli v. Bahadur* (1), does not appear to me to have any application to the present case. There the defendant failed to carry out his covenant to put the plaintiffs in possession of a zamindari share, in consequence of the estate being in the hands of a lessee who, of course, insisted on

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his own independent right, and the property itself was not mortgaged to secure the debt. Here we have a simple mortgage which undoubtedly secured the property to the mortgagee until his debt was paid, the two years' condition being merely in the nature of a contingent promise or expectation of releasing the property by payment of the debt within that time, and not otherwise limiting the plaintiff's rights under her security. Both the lower Courts are therefore clearly wrong in holding that the jurisdiction of the Munsif was ousted, and that the case could only be entertained by the Small Cause Court.

I would, therefore, allow the present appeal with costs, setting aside the judgment of both the lower Courts, and I would remand the case for disposal on its merits by the Munsif.

SPANKIE, J.—I cannot say that the decision of the lower appellate Court is open to the objection taken by appellant. The terms of the mortgage-deed are not denied, and it appears that the mortgage was for two years, and for those two years the mortgagee was put in possession as security for the interest rather than the principal. The mortgagors put the mortgagee in possession of the subject of the mortgage, and agreed to pay interest at eight annas a month, as well as the monthly rent. If they fail to pay the amount of the mortgage-money within the period of two years, the mortgagee would be at liberty to recover it in any way he pleased, but the deed does not provide that the house at the expiration of two years shall remain hypothecated for the payment of the money. It is admitted that the mortgagee has been put out of possession, and she now seeks to recover the amount of the money due to her by sale of the mortgaged property. The amount in suit is under Rs. 500, and the Courts below have held that there was no real security for the payment of the principal, and therefore that there could be no decree for the sale of the mortgaged property. The claim then became one cognizable by a Court of Small Causes. It was therefore dismissed.

The precedent relied on by the lower appellate Court—*Dulli v. Bahadur* (1), appears to be in point. The judgment is one to which I myself was a party, and I consider myself bound by it. But

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regretting that I differ from the honorable and learned Chief Justice, I am quite willing, if he should be disposed to refer it, that the case may go before another Judge. At present I would dismiss the appeal and affirm the judgment with costs.

The Judges of the Division Bench differing on a point of law, the appeal was referred under s. 575 of Act X of 1877 to Oldfield and Straight, JJ. The judgment of these Judges was delivered by

OLDFIELD, J.—The question which we have to determine is whether under the terms of the deed dated the 6th November, 1868, a mortgage was created in plaintiff's (appellant's) favour by reason of which she is entitled to recover the amount she claims by sale of the house alleged to be mortgaged.

In our opinion there can be no doubt that the deed creates a mortgage of the house as security for payment of the principal sum, Rs. 300, lent, and that the plaintiff is in consequence entitled to recover by sale of the mortgaged property. A pledge is created by the terms, "We, Murli Dhar and Sagar Mal, sons of Ram Lal, do hereby declare that we have mortgaged a house situate in Ghaziabad, bounded as below, and possessed by us, in lieu of Rs. 300, half of which is Rs. 150, to Kasbi Ram and Ganga Ram for two years," and the deed goes on to stipulate, "if we fail to pay the mortgage amount within the period of two years the mortgagee shall be at liberty to recover the mortgage-amount in any way he pleases." It is true that a term of two years is entered as the term of the mortgage, but this term is named with reference to the period within which the obligor was bound to satisfy the debt, and before the expiry of which the obligee could not demand payment, and it is obvious that the object of the mortgage would be frustrated if it were held to cease after two years, whether the debt be satisfied or not. The case on which respondents rely and which is referred to in the judgments of the Courts is distinguishable from the one before us. In that case the mortgage was a usufructuary mortgage for a term of years, and no question arose as to the right to bring the mortgaged property to sale in satisfaction of the debt. The only question decided was that the mortgagee could not retain possession of the mortgaged property after the term of the usu-

fructuary mortgage had expired. In the case before us, the deed cannot be held to pledge the house for the payment of interest, and so far the claim to recover interest as secured by the mortgage of the house will fail. An order will be made in the form proposed by the learned Chief Justice for remanding the case for disposal on its merits. The costs of the appeal to this Court and of the Courts below will follow the result.

*Cause remanded.*

### FULL BENCH.

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*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

EMPRESS OF INDIA *v.* SABSUKH AND OTHERS.

*Prosecution for offence against public justice and offence relating to document given in evidence—Sanction—Nature of sanction necessary—Act XLV of 1860 (Penal Code), ss. 193, 471—Act X of 1872 (Criminal Procedure Code), ss. 468, 469, 470—“Subordination” of Revenue Courts to the High Court.*

*Held* (SPANKE, J. doubting), on a reference to the Full Bench, that a Court of Revenue is a Civil Court within the meaning of ss. 468 and 469 of Act X of 1872.

*Held* also that the declining by a Court of Revenue to sanction a prosecution under ss. 468 and 469 of Act X of 1872, under a mistaken view of the law and under the impression that sanction was unnecessary, did not constitute sanction.

*Held* also that under the words “at any time” in s. 470 of Act X of 1872 sanction to prosecute cannot be given after the trial and conviction of the accused person.

Observations by STUART, C. J. on the “subordination” of Courts of Revenue to the High Court, within the meaning of ss. 468 and 469 of Act X of 1872.

*Held* by the Judge making the reference (STRAIGHT, J.), on the case being returned to him, that the accused persons having been prosecuted without the sanction required by ss. 468 and 469 of Act X of 1872, all the proceedings were invalid, and must be quashed, and the accused must be retried, sanction to their prosecution having been obtained.

THIS was a reference to the Full Bench by Straight, J. The facts out of which the reference arose and the points of law referred are stated in the order of reference, which was as follows :

STRAIGHT, J.—This was an appeal from a judgment of the Court of Session at Farukhabad. The case was argued before me on the 3rd November last by Mr. Leach for the appellants and the Junior

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Government Pleader for the Crown. I took time to consider judgment, not on the questions of fact, as to which I was quite satisfied, but upon the point of law that had been raised, and as upon consideration I feel that the matter is one of very serious importance, I have thought it best to state the following case for the opinion of the Full Bench.

The appellants were prosecuted for and convicted of offences against ss. 193 and 471, Indian Penal Code. The false evidence had been given and the forged document used on the trial of a suit in the Deputy Collector's Court, in which one Imam Khan, a zamindar, sought to recover arrears of rent from the appellant Sabsukh. The Deputy Collector found in favour of the claim, and upon appeal the Collector took the same view, dismissing the appeal in the following words: "I believe the receipt to be a clumsy forgery and now reject the appeal." Thereupon Imam Khan the before mentioned plaintiff presented a petition for sanction of prosecution in accordance with the provisions of ss. 468, 469, Criminal Procedure Code, and upon such petition the Collector made the following endorsement: "There is no rule of practice as to giving sanction in revenue cases, sanction is being given in criminal cases: the applicant is at liberty to bring the complaint in the Criminal Court separately: there is no need for sanction." Accepting this as a sanction Imam Khan proceeded with his prosecution and ultimately convicted the three appellants. The three questions upon which I wish to have the opinion of the Full Bench are as follows:—(i) Is a Revenue Court a Civil Court in the sense of ss. 468 and 469, Criminal Procedure Code? (ii) Can the Collector's endorsement on the petition for sanction, as above set out, be considered a "sanction" within s. 470, Criminal Procedure Code? (iii) Can this Court now, under the words "at any time" in s. 470, Criminal Procedure Code, itself give the required sanction, assuming the second question to be answered in the negative?

Mr. Leach and Babu Jogindro Nath Chaudhri, for the appellants.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

The following judgments were delivered by the Full Bench:

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STUART, C. J.—(After stating the facts and the questions referred): In answer to the first of these questions I am of opinion that Revenue Court is a Civil Court within the meaning and intent of s. 468 and 469, Criminal Procedure Code. The mischiefs against which these sections are directed are the giving of false evidence and using as genuine a forged document. By "Civil Court" here I understand any Court established for the administration of civil justice as distinguishable from a Criminal Court. To hold otherwise would be to give to Revenue Courts and their suitors unlimited powers of prosecution in such cases, for which no intelligible reason has been attempted to be offered, or could possibly be given, the essence of such offences being the perjury or false swearing and falsehood common to all Courts which act upon written or spoken evidence, and it could not for a moment be contended that a Revenue Court is not such a Court. My attention was directed to s. 435 of the Criminal Procedure Code which provides for contempts of Court in certain cases, and in regard to which the Court before which the contempt has been committed is described as "any Civil, Criminal, or Revenue Court." But these words, so far from demonstrating that the term Civil Court in ss. 468 and 469, Criminal Procedure Code, was intended to be used in its restricted sense as distinguishable from a Revenue Court, to my mind, when attentively considered, lead to the very opposite conclusion. This will clearly appear if we read these two sections along with s. 435, especially in regard to one of the offences mentioned in s. 435, namely, the offence defined in s. 228 of the Indian Penal Code. This offence is also included within the category of offences to be found in s. 468. It will thus be at once seen that, if we exclude the Revenue Court from s. 468, we bring that section into direct collision with s. 435. S. 435 mentions the offences, including that under s. 228, Indian Penal Code, which it contemplates "as committed in the view or presence of any Civil, Criminal, or Revenue Court," and it goes on to provide that "the Court may cause the offender, whether he be a European British subject or not, to be detained in custody, and, at any time before the rising of the Court on the same day, may take cognizance of the offence, and adjudge the offender to punishment by fine not exceeding Rs. 200, and, in default of payment, by imprisonment in the civil jail for a period not exceeding one month, unless such fine be



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sooner paid. In every such case, the Court shall record the facts constituting the offence, with any statement the offender may make, as well as the finding and sentence. If the offence is under s. 228 of the Indian Penal Code, the record must show the nature and stage of the judicial proceeding in which such public servant was sitting, and the nature of the interruption or insult offered." Here we have provision made for all the three kinds of Courts, the Civil and Revenue as well as the Criminal, taking notice of and punishing for, without complaint or commitment, the offence mentioned in s. 228, Indian Penal Code, while if the very same offence is prosecuted for under s. 468, there must be a "complaint," but the offence "shall not be entertained except with the sanction of the Court before which it was committed." This, however, is not inconsistent with s. 435, which provides for the case of the Court taking summary cognizance of and punishing for the offence committed before itself, for which purpose, it is obvious, no separate or express sanction is necessary, the Court showing its mind in that respect by the summary proceeding provided for. Now quite consistently with this view s. 468 contemplates the same offence being entertained, not in the summary form provided for by s. 435, but by complaint and commitment, in which the recorded sanction of the Court before which the offence was committed is necessary, because from the nature of the case that consent cannot otherwise be made to appear, and the same argument of course applies to all the other offences mentioned in s. 468, Criminal Procedure Code. This reasoning appears to my mind to be conclusive for holding that the term "Civil Court" in that section is meant to include those Civil Courts at least mentioned in s. 435 as distinguishable from Criminal Courts, and that therefore we are not driven to what I must call the incongruity, I might go the length of saying the mischievous incongruity, of holding that an offence that can be summarily entertained and punished by a Revenue Court, cannot be entertained or punished by the more deliberate procedure of complaint and commitment under s. 468. It is our duty to make the law as consistent and rational as we possibly can and not to leave its apparent contradictions and inconsistencies unsolved without every effort of explanation and reconciliation being used, and for that purpose to apply such principles of reasonable exposition as will fairly remove these contradictions and incon-

sistencies, by showing that they are only apparent and not real. And in doing this we simply, in my opinion, fulfil the duty incumbent on us to give such a degree of just expansion to the letter of the law as will effectually satisfy its spirit and intendment, and we would not do that, in the case before us, if we excluded Revenue Courts from the provisions of s. 468, Criminal Procedure Code.

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My answer to the second question is that the Collector's endorsement on the petition for sanction was not "sanction" within the meaning of s. 470, Criminal Procedure Code. On the contrary, it appears to me to be rather in the nature of a refusal to give sanction; for the Collector ends his endorsement with these words: "There is no need for sanction," and he must be taken therefore not to have given it.

As to the third question I entertain considerable doubts, although, if we have the power, I do not think we should under the circumstances be justified in giving sanction at this stage of the case. If the Revenue Courts were as a jurisdiction generally subordinate to this High Court, we of course could give sanction, but whether under the words "at any time" in s. 470 we could now give such sanction so as to validate the trial, conviction, and sentence before the Judge, is a question attended with considerable difficulty. I rather incline to the opinion that the words "at any time" were intended to mean at any time during the trial, seeing that it is for the purpose of such trial that the sanction is required, and without it the trial could not proceed, and that after conviction and sentence there is nothing to follow for which the sanction may be asked. The question, however, whether the Revenue Courts are, as a jurisdiction, legally and technically subordinate to this High Court is also a very difficult one. They may be subordinate in a certain sense, i. e., in those cases where there is an appeal to this Court within ss. 189, 190 and 191 of the Rent Act XVIII of 1873, but in regard to all other cases there is no appeal and no subordination. This is shown by the plaint in the revenue suit which is included in the record before us, and from which it appears that the suit was to recover rent, Rs. 36, principal, and Rs. 5-1-0, interest, in all Rs. 41-1-0. It is, therefore, quite clear that so far as this case is concerned there is neither subordination on the part of the Collector nor control on our part. That, however, I quite

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admit is a different question from the general proposition I have indicated, *viz.*, whether in the light of jurisdiction generally the Revenue Court is amenable to the High Court? I rather incline to the opinion that as a jurisdiction the Revenue Court is not subordinate to the High Court. The policy of the Act (upon which I express no opinion) was clearly to exclude all interference whatever by the Civil Courts, and especially by this High Court, for it was in consequence of judgments by this Court which were deemed inconvenient by the Revenue authorities that the Rent Act XVIII of 1873 was passed. Therefore as a general question I should hold that the Revenue Courts were not subordinate to this Court, and that conclusion lends considerable force to the case before us, seeing that it was not one which could by any means be brought under our appellate or revisional jurisdiction. Another difficulty has been stated, *viz.*, whether under s. 15 of the High Courts' Act this Court has any control or superintendence over the Revenue Courts. That again depends upon whether the Revenue Courts are subject to our appellate jurisdiction within the meaning of the Act. But that again depends on what is there meant by "appellate jurisdiction"? Does it mean appellate jurisdiction generally, or can it be held to be understood as appellate jurisdiction within the limited meaning and application of the Rent Act? The latter, as it appears to me, cannot be taken as the true construction. The kind of subordination and control given us in certain cases by the Rent Act is something different from, because less than, the "superintendence" mentioned in s. 15 of the High Courts' Act. By these remarks I have indicated the doubts and difficulties which appear to me to stand in the way of a distinct answer to Mr. Justice Straight's third question, although, under any circumstances, I should be opposed to giving sanction in the present case.

PEARSON, J.—I entertain no doubt that a Revenue Court is a Civil Court within the meaning of the term "Civil Court" as used in ss. 468 and 469 of the Criminal Procedure Code. In those sections Civil Courts are broadly distinguished from Criminal Courts. There is no reason to suppose that by the terms "any Civil Court" only the ordinary Civil Court is meant. The object in view is to prevent wanton, groundless or malicious prosecutions of the offences therein mentioned, by requiring the sanction of the

Courts in or before or against which those offences may be committed to the prosecution of them. It is impossible to suppose that the restriction thereby imposed on such prosecutions is applicable only to such offences committed in or before or against the ordinary Civil Courts, and not equally to similar offences committed in or before or against the Revenue Courts which, not less than the ordinary Civil Courts, try and determine suits of a civil nature.

I am of opinion that the Collector's order on the petition praying for sanction of prosecution in the case before us cannot be held to have given the sanction prayed for. On the contrary, under a mistaken view of the law, and under an impression that sanction was unnecessary, that officer distinctly declined to give his sanction, and left the petitioner to proceed in the matter of his own motion.

I am further of opinion that sanction cannot now be retrospectively given to the present proceedings, although fresh proceedings may be sanctioned by competent authority. Sanction is an essential preliminary to the institution of proceedings and the entertainment of a complaint.

The foregoing remarks embody my views on the three points referred to the Full Bench.

SPANKIE, J.—I confess that I entertain doubts in answer to the first question whether a Revenue Court is a Civil Court in the sense of ss. 468 and 469 of the Criminal Procedure Code. A Revenue Court has been defined in cl. (9), s. 3 of Act XIX of 1873. In s. 93 (a) of Act XVIII of 1873 the Courts of Revenue are distinguished from other Courts, and certain suits are made cognizable by Courts of Revenue and no other Courts, and as Courts they have their own procedure, *vide* s. 104 of the Act.

In s. 204 (a) if the presiding officer of a Revenue Court considers that any question or issue involving a point of law is more proper for the decision of a Civil Court, such officer is to act in the manner prescribed by the section. Here Civil Courts are distinguished from Revenue Courts. Again in s. 205 (a) on a question of a power to take cognizance in any suit instituted or on any appeal presented in a Civil or Revenue Court, the Judge or presiding officer may refer the

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matter to the High Court. Here again the two Courts are clearly distinguished. S. 435 of the Code of Criminal Procedure in chapter XXXII provides for certain cases of contempt committed in the view or presence of any Civil, Criminal, or Revenue Court. Here are three Courts clearly distinguished. But under s. 467, in all offences under chapter X of the Penal Code, not including those falling within ss. 435 and 436 of the Criminal Procedure Code, no *complaint whatever* (except where the proviso attached to the section applies) can be entertained without the sanction or except on the complaint of the public officer concerned, or of his official superior. When we come to the words of s. 468 of the Criminal Procedure Code, the reference is to the offences under the sections cited before or against a *Civil* or *Criminal* Court, and in such cases sanction is required and it is the same with s. 469. If Revenue Courts are included in the word "*Civil*," why are the three Courts distinguished separately in s. 435? It may be asked why should sanction be necessary in Civil Courts and not in Revenue Courts? This I cannot explain: nor am I bound to explain the reason. But after the recognition by the Code of the Revenue Courts, something more appears to me to be intended than the use of the word "*Civil*" as opposed to Criminal. I admit that in s. 19 of the Penal Code "*Judge*" denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, &c. But a Judge is also a "*public servant*" (s. 21), and the definition is intended to apply to the sections in the Penal Code which relate to Judges and public servants, and "*Civil*" is doubtless broadly opposed to "*Criminal*." The reference in s. 2 of the Rent Act to this section of the Penal Code and the Illustration (a) makes the Collector a Judge for the purposes of the Penal Code and no further. I simply say that s. 435 recognizes the three Courts, and ss. 468 and 469 recognize two only. It may, however, be observed that s. 643 of the Civil Procedure Code, which replaces ss. 16, 17, and 19 of Act XXIII of 1861, provides the procedure in cases pending before any Court (to which of course the Code applies), when there appears to be sufficient ground for sending for investigation to any Magistrate charges of certain offences under the Penal Code. As the Courts have the power to act thus conferred upon them by s.

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643 of Act X of 1877, it may be that it was thought desirable that sanction should be given in those cases of complaint in which the Court itself had not taken action, and this with a view to check baseless complaints. But I cannot find any such power given by the procedure in Revenue Courts to the presiding officers of those Courts. In the draft of the new Code of Criminal Procedure as amended, I find that s. 196 amends ss. 467 and 468, by clauses (b) and (c), so as to prevent any possible doubt arising on the point referred to us, because it refers to offences committed before or "against any Court," and therefore all recognized Courts are included, and sanction of the Court or of some other Court to which it is subordinate is required. In s. 476 of the amended draft Bill the words "any Court" again are used; and any Court is empowered to send an accused to the Magistrate. If this were the wording of the present Code, and s. 467 included all the sections in s. 196 of the proposed amended Act, then we would have easily disposed of the present reference, as any Court could have sent the accused to the Magistrate for inquiry on a charge of giving false evidence. But under s. 478 the words "any Civil Court" are used, and a larger power is given to such Court in cases in which the offence is triable by the High Court or Sessions Court exclusively. Here it may be that, although all Courts may send an accused person to the Magistrate for inquiry into offences, only the regular Civil Courts may in certain cases actually themselves commit the offenders. I may also add that in s. 480, which is to replace s. 435 of the present Code, in respect of certain cases of contempt, the words "Revenue Court" are not used. It is sufficient that the offence is committed in the view or presence of "any Court." I think, therefore, I have shown that there is some room for doubt whether, under the wording of ss. 468 and 469 of the Criminal Procedure Code now in force, any sanction is required before a prosecution for giving false evidence in a Revenue Court is entertained. I say room for doubt, for it does seem anomalous that no provision has been made for such a case as that referred to us in the Revenue, when full provision for similar offences has been made in regard to the Civil Courts. I should have been glad if it had been otherwise and to have concurred with my honourable colleagues on this question as on the others referred to us.

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In reply to the second question I do not find that the Collector's endorsement on the petition for sanction amounts to, or can be considered, a sanction within the meaning of s. 470 of the Criminal Procedure Code.

In answer to the third question, I consider that, if sanction is necessary, it is too late for this Court at this stage of the case to grant it. The blot occurs at the outset. There was no jurisdiction to entertain the complaint in the first instance, if sanction was necessary. The error too was not one that occurred after the complaint was entertained, and therefore might be condoned under the terms and subject to the proviso of s. 283 of the Code of Criminal Procedure.

I may add that I cannot find that the Board of Revenue has ever made any rules under s. 211 of Act XVIII of 1873 and s. 256 of Act XIX of 1873 for the practice and procedure of Revenue Courts on complaints of the nature before me.

STRAIGHT, J.—In reply to the first question submitted by me to the Full Bench for its opinion, I have to say that, in my judgment the Revenue Court is a Civil Court in the sense of ss. 468 and 469, Criminal Procedure Code. I think that the alternative expressions "Civil or Criminal Court" are intended to include all tribunals concerned in the administration of Civil or Criminal Justice, before which "judicial proceedings" are held, as defined in the interpretation clause of the Criminal Procedure Code. I have in vain sought to discover any intelligible reason why a distinction should have been drawn by the Legislative authorities between Revenue Courts on the one hand and Civil and Criminal Courts on the other. Sanction appears to be just as desirable and necessary in either case. Moreover by s. 2 of the Rent Act (XVIII of 1873) it is specifically provided that Illustration (a) of s. 19 of the Penal Code shall be read as if it applied to that Act, the effect of which is to declare that a Collector exercising powers under Act XVIII of 1873 (as in this case) is a Judge. Therefore you have a "Judge" and a "judicial proceeding", which it must be admitted is of a Civil character. It is true that the Rent Act draws a distinction between Revenue and Civil Courts, but that is merely for convenience of expression and to avoid confusion, and in no way interferes with the

Revenue Court falling within the generic term Civil Court, as used in ss. 468, 469 of the Criminal Procedure Code. Consequently I think the Collector's sanction to the institution of the prosecution ought to have been given, and that without it the whole of the proceedings before the Magistrate and the Court of Session are void.

In answer to the second question, I am very clearly of opinion that the order endorsed by the Collector on the complainant's petition can by no twisting of terms or distortion of language be construed into a sanction.

As to the third question, I do not think that the words "*at any time*" in s. 470, Criminal Procedure Code, give the Court power, after conviction and upon appeal or revision, to grant a sanction, and so to validate proceedings otherwise invalid from their inception to their close. It appears to me that, for the purpose of determining what those words mean, ss. 468, 469, and 470 must be read together, and so treating them, the construction seems to be that a complaint for any of the enumerated offences shall not be entertained, except when the sanction of the Court before or against which an offence has been committed is previously obtained. In other words, if I take the correct view, the required sanction is a condition precedent to the very first commencement of the prosecution. The term "complaint," as used in the Criminal Procedure Code, has a perfectly intelligible meaning and requires no definition on my part. Apart from this, it appears to me there is a provision of the Code that places any question upon the point I am now discussing almost, if not entirely, beyond dispute. I refer to s. 142, which enacts that nothing in that or the preceding section shall "authorize a Magistrate to *entertain a complaint* of an offence without sanction, where such offence by any law in force may not be entertained without sanction". I may also point out that in s. 466, Criminal Procedure Code, the sanction there provided must be given "before the commencement of the proceedings". Under all the circumstances already adverted to, and endeavouring to place a reasonable and practical construction on the words "at any time," I cannot bring myself to give them the enlarged interpretation contended for by the Junior Government Pleader. To do so would appear to me to open the door to the very mischief the Act was

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intended to guard against, namely, the indiscriminate institution of prosecutions by private persons for offences against public justice committed in contempt of and against Civil or Criminal Courts, for their own ends and objects, without any check. If my view of the section is incorrect, then there is nothing to prevent a person, except the watchfulness of the Magistrate, from putting the criminal law in motion to harass or oppress another with whom he has been unsuccessful in litigation, and to defer obtaining or attempting to obtain the sanction of the Court before which his suit has been tried until the latest possible moment. To my mind prosecutions for the offences enumerated in s. 468 and 469 must have the stamp and countenance of the offended Court, otherwise they fall to the ground. My answer therefore to the third question submitted is in the negative. Upon receipt of the decision of the Full Bench, I will dispose of the appeal.

OLDFIELD, J.—I quite concur in the view of the law taken by Mr. Justice Straight.

The case having been returned to the Judge making the reference, the following order was made :

STRAIGHT, J.—The practical effect of the decision of the Full Bench, upon my reference of this case, is that the whole of the proceedings against the appellants from the commencement must be quashed ; the investigation before the Magistrate and the trial in the Sessions Court being invalid by reason of the absence of the Collector's sanction to the institution of the prosecution. The charge is of so serious a character that the matter cannot be allowed to rest, and in the interest of public justice it is essential that the accused, who seem to have been most properly convicted on the facts, should not escape by reason of the technical difficulty that has arisen. There must, therefore, be a retrial, and I accordingly order that the record be remitted to the Magistrate of the District through the Sessions Judge. Application must be made to the Collector for his sanction to the proceedings, and his attention must of course be called to the judgment of this Court as to the legal necessity for its being given. When the sanction has been obtained the prosecution must be continued in ordinary course to committal, and after that to trial before the Court of Session. Of course should the accused be again convicted the Sessions Judge will, in inflicting

punishment, have regard to the length of time during which they have already undergone imprisonment.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.*

JAGAN NATH PANDAY (PLAINTIFF) v. PRAG SINGH (DEFENDANT).\*

*Grant of land exempt from revenue—Grant of land exempt from rent—Regulation XIX of 1793, s. 10—Regulation XLI of 1795, s. 10—Act XVIII of 1873 (N.-W. P. Rent Act), ss. 30, 95—Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 79, 241—Jurisdiction of Civil Court.*

The plaintiff in this suit claimed the possession of certain land in virtue of a grant thereof to him, not merely of the proprietary right in such land, but of the rents of the same undiminished by the payment of the revenue assessed thereon, which the grantor took upon himself to pay.

*Held by* STUART, C. J., PEARSON, J., and OLDFIELD, J., that the grant was null and void and liable to resumption, with reference to ss. 10 of Regulation XIX of 1793 and Regulation XLI of 1795, and s. 30 of Act XVIII of 1873 and s. 79 of Act XIX of 1873.

*Per* SPANKIE, J. that the question whether the grant was null and void with reference to those Regulations and Acts did not arise, as the grant, on the facts found by the Court below, was not one within the terms of those Regulations.

*Held per* STUART, C. J., PEARSON J., and SPANKIE, J. that the suit was cognizable by the Civil Courts.

THIS was a suit for the possession of twenty-nine bighas, ten biswas, of "*krishnarpan*" land. The plaintiff stated in his plaint that the land in suit was granted to him by Rajah Ramadhin Singh, whom the defendant Sheobachan Kuar represented, as "*krishnarpan*," that he had enjoyed the profits of the land, and that on his instituting a suit for arrears of rent, Sheobachan Kuar intervened and denied that he was in possession of the land. Sheobachan Kuar set up as a defence to the suit that Ramadhin Singh had not granted the land to the plaintiff as "*krishnarpan*," that the plaintiff had not obtained possession of the land, and that the grant, even if it were made, was invalid. Prag Singh, who had purchased the rights and interests of Sheobachan Singh in the village in which the land in suit was comprised in the execution of a decree, set up the same defence to the suit. The Court of first instance fixed as issues, (i) Could Ramadhin Singh make a grant of the land as

\* Second Appeal No. 351 of 1878, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 6th March, 1878, reversing a decree of Rai Bakhtawar Singh, Subordinate Judge of Benares, dated the 11th December, 1876.

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"*krishnarpan*", and did he make such a grant in the plaintiff's favour, and has the plaintiff been in possession of the land in virtue of the grant, and (ii) If the grant were made, can Sheobachan Kuar resume the land. With reference to these issues the Court of first instance found that Ramadhin Singh had made a charitable gift of the land to the plaintiff by way of "*krishnarpan*," that mutation of names had been effected, and that the grantee had received the profits of the land through the agents of the grantor. The Court then made the following observations on the issues: "The reason why the Deputy Collector first refused to enter the plaintiff's name was that it was not represented to that officer what arrangement had been made for the payment of the Government revenue, and it was not until the presentation of an application by the Rajah's agent and the verification of the petitions of both parties that the Deputy Collector gave orders for mutation of names, the aforesaid application being to the effect that the Rajah had merely made a grant of his own title and the Government revenue would not at all thereby suffer, that the proprietor of the village was responsible for it as formerly, and that the grantee would merely retain the title of the grantor : in these Provinces, charitable grants of lands are generally made to the Brahmins by Rajahs and zamindars out of their estates, and the grantees are allowed to remain in possession and their possession has also been confirmed : now, inasmuch as Sheobachan Kuar's ancestor made a gift to plaintiff of the title to the profits of the land, the said Sheobachan Kuar cannot resume that title : moreover the grant being a charitable gift (*dán*) cannot be revoked, in accordance with the Hindu law : there can be no doubt that the owner of the village had the power to make a gift of whatsoever title he possessed, for his own benefit in the next world". On appeal by Prag Singh the lower appellate Court found that the land had been granted to the plaintiff as "*krishnarpan*," about eleven years before the suit was brought, but that the plaintiff had not been put in possession of the land, that he had not collected the rents of the land from the ryots, but that such rents had been collected, together with the rents of the other lands of the village, by the agents of the grantor, and that such agents occasionally paid a portion of the moneys so acquired to the plaintiff. It held, with reference to sa.

10 of Regulation XIX of 1793 and Regulation XLI of 1795, that the grant was null and void, and dismissed the plaintiff's suit, with the following remarks: "I find that Rajah Ramadhin Singh was not empowered to make a grant of "*krishnarpan*" land, and that though Jagan Nath Panday may possibly have sometimes received cash from the Rajah's *karinda*, while that person realised from the ryots who cultivated the land in suit, he, Jagan Nath Panday, was never actually placed in possession of the land, and, with reference to these remarks, I allow the appeal and reverse the judgment of the lower Court."

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The plaintiff appealed to the High Court. The appeal came for hearing before a Division Bench composed of Pearson, J., and Oldfield, J., which referred to the Full Bench the questions whether the grant was null and void, and whether the suit was maintainable and properly instituted in the Civil Court, the order of reference being as follows :

OLDFIELD, J.—The suit has been brought by the plaintiff to recover possession of certain *krishnarpan*, or rent-free, land, on the ground that a grant thereof, exempt from the payment of rent to the grantor, was made to him by the former owner, Rajah Ramadhin, and that the defendant who has purchased the estate in which the land is situated has dispossessed him. It seems sufficiently shown that there was a complete gift of this land to the plaintiff on the part of the Rajah, his name was entered in the revenue papers in respect of the holding, and the rents, though collected by the Rajah's agent, were collected on the plaintiff's behalf, and for his benefit and enjoyment, but a question arises whether the grant is one of those which are null and void by the express provisions of the law.

The law applicable to the province of Benares is Regulation XLI of 1795, s. 10, which, *mutatis mutandis*, re-enacts s. 10, Regulation XIX of 1793, and by it all grants for holding land exempt from the payment of revenue, whether exceeding or under fifty bighas, that have been made since the beginning of the Fasli year 1196, or that may be hereafter made, by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter con-

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sidered to give validity to any such grant, either with regard to the property in the soil or the rents of it ; and every person who now possesses or may succeed to the proprietary right in any estate, or who now holds or may hereafter hold any estate in farm of Government, or of the proprietor, or any other person, and every officer of Government appointed to make the collections from any estate or talúq held khas, is authorized and required to collect the rents from such lands at the rates of the pargana, and to dispossess the grantee of the proprietary right in the land, and to re-annex it to the estate or talúq in which it may be situated, without making previous application to a Court of Judicature, or sending previous or subsequent notice of such dispossession or annexation to any officer of Government. The invalidity of these revenue-free grants was affirmed by s. 28, Act X of 1859, the only alteration in the law being that the proprietor was henceforth to dispossess and collect the rents and re-annex the land to the estate by application to the Collector and not on his own authority. Then s. 30, Act XVIII of 1873, and s. 79, Act XIX of 1873, were enacted as follows:—"And whereas all grants (whether in writing or otherwise) for holding land exempt from the payment of rent which have been made since the first day of December, 1790, by any authority other than that of the Governor-General in Council, were declared by Bengal Regulation XIX of 1793, section 10, to be null and void, and like provisions have been by divers Regulations applied to the several parts of the territories to which this Act extends, and the said Regulation XIX of 1793 also provided that no length of possession should be considered to give validity to any such grant, either with regard to the property in the soil or the rents of it, it is hereby enacted as follows":—and then follow provisions for the resumption of such grants. It will be seen that the language of the above sections differs from that of the old Regulations to which they refer in this important particular, namely, that whereas the grants in the old Regulations are called grants of land held exempt from payment of revenue, the same grants are referred to in Acts XVIII and XIX of 1873 as grants of land exempt from the payment of rent.

The question which arises in the case before us is whether the grant, which appears to be one of the proprietary right in certain

land included in the area of a revenue paying estate, without any reservation of rent to the grantor, but which is not claimed to be held exempt from payment of revenue to Government, is to be considered to be one of those grants to which the laws above cited apply. Before the enactment of Acts XVIII and XIX of 1873 it was a much vexed question whether the Regulations were not intended to apply only to grants of land exempt from payment of revenue, as something different from rent, and to grants where the land had been separated from the revenue paying area, and therefore not to such a grant as we have before us ; and the question will be found fully argued in the case reported in 9 Weekly Reporter, page 1. It was there held by the Calcutta High Court, though some of the Judges dissented, that "the grant by a zemindar for valuable consideration of a piece of land to be held without payment of rent is valid, as against the heir of the grantor or a purchaser from him by private sale of the zemindari, and that under s. 10, Regulation XIX of 1793, such heir or purchaser is not entitled to resume the land." But on the other hand, there is a decision of the Sudder Dewany Adawlat, North-Western Provinces, June 8th, 1865 (1), which appears to hold that grants of land exempt from the payment of rent are such as were contemplated by the old Regulations, and are null and void, but the current of the previous decisions seems certainly opposed to this view, as also is a reported case of a later date of this Court, No. 1503, March 27th, 1863 (2).

It may be, however, that it was the intention of the Legislature by importing into s. 30, Act XVIII of 1873, and s. 79, Act XIX of 1873, the words "exempt from the payment of rent," in referring to the law of the old Regulations, to set the matter at rest, and to make grants of land exempt from the payment of rent, such as the one in question, null and void, or it may be that a suit of this nature is not now maintainable in a Civil Court, with reference to other provisions of Acts XVIII and XIX of 1873.

The *Senior Government Pleader* (Lala Juala Prasad), Munshi Hanuman Prasad, and Pandit Bishambhar Nath, for the appellant.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Pandit Ajudhia Nath, for the respondent.

(1) S. D. A., N.-W. P., 1865, p. 333.

(2) H. C. R., N.-W. P., 1863, p. 186.

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The following judgments were delivered by the Full Bench:

STUART, C. J.—I am quite clear that the Civil Court could entertain this suit, and on this point I agree with Mr. Justice Pearson that the contention to the contrary is so unreasonable as to be at once rejected. It could not for a moment be argued that the plaintiff's claim comes within the express words either of s. 95, Act XVIII of 1873, or of s. 79, Act XIX of 1873, nor could it be shown to do so within the meaning of these two sections, because under these Acts an application for resumption of a grant of this nature might have been preferred to the Revenue Court by the former owner, Rajah Ramadhin Singh.

As to the subject of the suit itself, I am very much of Mr. Justice Spankie's opinion that the Regulations and Acts mentioned in the referring order do not apply to it, or at least are not necessary to its disposal, for on the facts found by the Judge the plaintiff has in special appeal evidently no case whatever. But, assuming that the Regulations and Acts referred to apply, I am clearly of opinion that they must be read so as to render this grant null and void. I must, however, observe that, for the purposes of such a case as this, the difference between the language of the two old Regulations referred to and that to be found in Acts XVIII and XIX of 1873 is in my opinion more apparent than real. S. 10, Regulation XIX of 1793, which is re-enacted by s. 10, Regulation XLI of 1795, enacts and declares that all grants for holding land exempt from the payment of revenue, whether exceeding or under fifty bighas, that have been made since the beginning of the Fasli year 1196, or that may be hereafter made, by any other authority than that of the Governor-General in Council, are null and void," and it then goes on to make the following important and general declaration that "no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil or the *rents of it*": and further on the Regulation provides that, "Every officer of Government appointed to make collections from any estate or taluq held khas is authorized and required to collect *the rents* from such lands at the rates of the pargana, and to dispossess the grantee of the proprietary right in the land, and to re-annex it to the estate or taluq in which it may be situate, without making a previous application to a Court of Judicature, or sending previous or

subsequent notice of such dispossession or annexation to any officer of Government." It appears to me that these enactments destroy every possible right and interest which the grantee might have claimed in the subject of the grant, including not only land exempt from the payment of revenue but land out of which rents might be collected, and that therefore Acts XVIII and XIX of 1873 merely re-enact what had previously been the law, by necessary construction, under the Regulations referred to. In my view of the case, therefore, the plaintiff's suit and also the appeal to the Division Bench should be dismissed.

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PEARSON, J.—On the first of the two questions referred to the Full Bench, my opinion is that the grant claimed in this suit is null and void. The grant was not merely a grant of the proprietary right in the land, which was the subject of it, but it was intended to convey the grantee the whole yield or rent of the land undiminished by the payment of the Government revenue thereon assessed, which the grantor took upon himself to pay. There was no intention to injure or defraud the Government, but the effect of the arrangement was to shift the payment of the revenue from the land itself on to the shoulders of the grantor. I concur with the District Judge in the view that the grant was illegal under the laws cited by him and is liable to resumption. The Legislature apparently holds every bit of land to be, as it were, hypothecated for the revenue due from it, and will not allow the burden to be shifted elsewhere.

On the second question raised by the referring order, I am not prepared to hold that the suit is not cognizable by the Civil Court. It must be admitted that the loose language of s. 95 of Act XVIII of 1873 affords some ground for the contention that, inasmuch as an application for the resumption of the grant might have been preferred to the Revenue Court by the grantor, therefore this suit by the grantee to be maintained in possession of the grant is excluded from the cognizance of the Civil Courts; but the contention is so unreasonable that one feels bound to reject as unreasonable any construction of the language of the section which would support it.

SPANKIE, J.—The learned Judges who refer this case for the opinion of the Full Bench remark that the question for consider-



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ation is whether the grant, which appears to be one of proprietary right in certain land included in the area of a revenue paying estate, without any reservation of rent to the grantor, but which is not claimed to be exempt from payment of revenue to Government, is to be regarded as one of those grants to which Regulations XIX of 1793 and XLI of 1795 and Acts XVIII and XIX of 1873 apply. We are also asked whether the plaintiff's suit is maintainable and properly instituted in the Civil Court.

The terms of the Regulations are that all grants for holding land exempt from payment of revenue, whether exceeding or under fifty bighas (1), that have been made since the beginning of the Fasli year 1196, by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil or the rents of it. S. 30, Act XVIII of 1873, and s. 79, Act XIX of 1873, recite that "Whereas all grants (whether in writing or otherwise) for holding land exempt from the payment of rent which have been made since the first day of December, 1790, by any authority other than that of the Governor-General in Council, were declared by the Bengal Regulation XIX of 1793, s. 10, to be null and void, and like provisions have been by divers Regulations applied to the several parts of the territories to which this Act extends, and the said Regulation XIX of 1793 also provided that no length of possession should be considered to give validity to any such grant, either with regard to the property in the soil or the rents of it, it is hereby enacted" &c. &c. &c. Undoubtedly there is a difference between the Regulations and Acts. In the former the grants are spoken of as "exempt from the payment of revenue," and in the latter as "exempt from the payment of rent."

The learned Judges remark that before the enactment of Acts XVIII and XIX of 1873 it was a much vexed question whether the Regulations were not intended to apply only to grants of land exempt from the payment of revenue, as some thing different from rent, and to grants when the land has been separated from the revenue

(1) Note by the Judge.—In s. 10, Regulation XIX of 1793, whether exceeding or under one hundred bighas : but Regulation XLI of 1795 is more particularly concerned with this case.

paying area, and therefore not to such a grant as the one set up in this case. They refer to the decision of the Calcutta High Court in *Muhammad Akil v. Asad-un-nisa Bibee* (1), and to a decision of the Sudder Dewany Adawlat, North-Western Provinces, *Rajah Dilsukh Rai v. Kurban Ali* (2), and to one of this Court in *Ahmad-ullah v. Mihoo Lall* (3). In the first cited case it was held that a grant by a zemindar for valuable consideration of a piece of land to be held without payment of rent is valid as against the heir of the grantor or a purchaser from him by private sale of the zemindari, and that under s. 10, Regulation XIX of 1873, such heir or purchaser is not entitled to resume the land. The Calcutta High Court's ruling has all the weight of authority, and the decision of the Chief Justice, Sir Barnes Peacock, appears to me to be unanswerable.

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It must, however, be admitted that s. 30 of Act XVIII of 1873, and the corresponding section of Act XIX of 1873, have adopted the view taken by the Sudder Dewany Adawlat of these Provinces in their decision cited above, and have declared that the former Regulations referred to rent and not revenue, and therefore, assuming that the Legislature is authorized to interpret s. 10, Regulation XIX of 1873, as it pleases, we probably are bound to give effect to the law as it is laid down in these later Acts. I do not, however, think that we need consider this part of the case at greater length, for I doubt whether the Regulations or the Acts apply to the particular case before us. The appeal was one from an appellate decree, and I observe that the Judge finds as a fact that Jagar Nath Panday was never put in possession of the land: that the rents of the land in dispute were collected along with the rents of the other lands of the village by the Rajah's agent, by whom a part of the money thus collected was occasionally paid to Jagar Nath Panday. It would also seem that the revenue of the land was paid by the Rajah to Government (this indeed is shown by the proceedings before the Deputy Collector), and the rent of the land in dispute was collected as usual by his agent, and therefore all that the plaintiff acquired by the transaction was a portion of the share of the produce of the land which

(1) 9 W. R. 1. (2) S. D. A., N.-W. P., 1865, p. 333.  
(3) H. C. B., N.-W. P., 1863, p. 186.

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would otherwise have been retained by the Rajah himself. It was as if a portion of the zemindar's own income was reserved as a charitable allowance for Jagar Nath Panday. It was not even assigned by any written instrument. If this was the position, I do not consider that there was any grant within the terms of Regulation XIX of 1793 as extended to Benares by Regulation XLI of 1795, and I, therefore, do not think that those Regulations or the Acts of 1873 would apply to the case. The suit appears to have been one with which a Civil Court had jurisdiction to deal.

OLDFIELD, J.—S. 30, Act XVIII of 1873, and s. 79, Act XIX of 1873, declare grants of land exempt from the payment of rent to be null and void and resumable, with the exception of the rent free grants especially reserved from the application of s. 79 by the provisions of ss. 80, 81, 82, Act XIX of 1873. The plaintiff, therefore, cannot succeed in his suit.

## APPELLATE CIVIL.

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*Before Mr. Justice Pearson and Mr. Justice Straight.*

SAFDAR ALI KHAN (PLAINTIFF) v. LACHMAN DAS AND OTHERS  
(DEFENDANTS).\*

*Release—Reception in evidence of Unstamped and Unregistered Document—Appeal—Fraud—Act VIII of 1859 (Civil Procedure Code), s. 350—Act X of 1877 (Civil Procedure Code), s. 578—Stamp—Registration—Mortgage.*

In June, 1875, *L* executed a bond in favour of *S* in which he mortgaged, amongst other property, a village called Chand Khera, as security for the payment of certain moneys. He subsequently sold such village to *A*, concealing the fact that it had been mortgaged to *S*. On this fact coming to the knowledge of *A*, he threatened *L* with a criminal prosecution, whereupon *L* proposed to *S* in writing that the security of a share in a village called Kelsa, which he alleged was his property should be substituted for the security of Chand Khera. *S* accepted this proposal by a letter in which he referred to *L*'s proposal in terms. It subsequently appeared that the share in Kelsa did not belong to *L* but to another person. *S* having sued upon his bond, claiming to enforce thereunder a lien upon Chand Khera, *A* set up as a defence to the suit that *S* had agreed to substitute Kelsa for Chand Khera in the bond, producing *S*'s letter as evidence of the agreement. *Held* that such letter operated as a release and should therefore have been stamped and registered.

\* First Appeal, No. 72 of 1879, from a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Moradabad, dated the 31st March, 1879.

*Held* also that an objection may properly be taken in a Court of first appeal to an unstamped document, and such Court is bound to entertain the objection and may direct that the document be stamped and the penalty imposed.

*Held* also that *L's* fraud vitiated *S's* agreement to substitute the security of *Kelsa* for the security of *Chand Khara* in the bond, and *S* was entitled, notwithstanding *A* might have purchased the latter property in good faith, to the enforcement of the lien created thereon by the bond.

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*Mark Riddell Currie v. S. V. Mutu Ramen Chetty* (1) discussed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court to which the plaintiff appealed from the decree of the Court of first instance.

Mr. Conlan and Munshi Hanuman Prasad, for the appellant.

Pandit Bishambhar Nath, Babu Ratan Chand, and Shah Asad Ali, for the respondents.

The judgment of the High Court (PEARSON, J. and STRAIGHT, J.) was delivered by

STRAIGHT, J.—This was a suit brought by the plaintiff, appellant, to recover the sum of Rs. 20,375, principal and interest, on a bond dated the 18th of June, 1875, executed by the defendant Afzal Ali. The plaintiff also sued the defendant Lachman Das for the amount under another bond of the same date, whereby he had given security for the loan and interest, and hypothecated certain properties scheduled in the deed, including 20 biswas of mauza Chand Khara, pargana Amroha, the bounds and limits whereof were duly and properly detailed. The plaintiff further prayed for enforcement of lien against the property hypothecated.

The defence put forward by Afzal Ali substantially amounted to this, that he was a mere dummy in the transaction, that Lachman Das was the real borrower, and that the bond on which it was sought to make him liable was fictitiously executed in his name for some motives of expediency. Lachman Das admitted his liability under the security-bond, and that he did in the first instance hypothecate the several properties therein specified, but he went on to allege that, with the consent of the plaintiff to an agreement of the 16th December, 1876, the mauza of Chand Khara was withdrawn from the list, and 2½ biswas of mauza Kelsa and a shop, together with a

(1) 3 B. L. R., 126.

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note of hand for the amount of the loan of one Sahu Sham Saran Das, treasurer of Rampur, were substituted.

The Subordinate Judge held that Afzal Ali and Lachman Das were both responsible for the payment of Rs. 20,375, and that the mauza of Chand Khera had been exempted from the operation of the security-bond of the 18th June, 1875, with the sanction and consent of the plaintiff. For reasons that will presently appear, when we come to the facts, Sheikh Ali-uddin had come into the suit as a defendant by making certain objections to the plaintiff's claim, and had formally been made a party to it under an order of the Court of the 6th September, 1878, pursuant to s. 32, Act X of 1877. His interference related solely to mauza Chand Khera, and as appears from what has already been stated, he was successful in securing the exemption of that property from the decree. The Subordinate Judge ultimately passed an order in plaintiff's favour for the amount of his claim by enforcement of lien on the property hypothecated in the security-bond of June, 1875, excluding mauza Chand Khera and substituting in lieu thereof the  $2\frac{1}{2}$  biswas of Kelsa already mentioned. From this decision the plaintiff appealed and the following shortly state his grounds of appeal: (i.) That mauza Chand Khera has been exempted on illegal and insufficient evidence: (ii.) That a letter of the plaintiff of the 3rd May, 1877, being without a stamp and unregistered, ought not to have been received in evidence, as it was put in to prove the relinquishment of an interest in immoveable property above the value of Rs. 100: (iii.) That even if there had been any relinquishment by the plaintiff it was only conditional and was so regarded by the defendant Sheikh Ali-ud-din: (iv.) That plaintiff was no party to the document of the 16th December, 1876, put forward by Lachman Das and never gave his consent to it.

The facts of the case appear to be as follows: The plaintiff is a native gentleman of some position resident at Rampur. The two defendants Afzal Ali and Lachman Das both come from Moradabad or thereabouts, while the third, Ali-ud-din, is a pleader living and practising there and in the district. It seems altogether indifferent to the question we have to decide whether the Rs. 20,000 were advanced to and for the use of Afzal Ali or Lachman Das. Certain

it is that they are both liable for its repayment, and we accept without hesitation the finding of the Subordinate Judge as to their joint and several responsibility to the plaintiff.

The substantial point for our consideration, as in the determination of it all the other pleas in appeal must be disposed of, is, was the Subordinate Judge right in law and fact in excluding mauza Chand Khera from enforcement of lien and in substituting for it the 2½ biswas of mauza Kelsa and the shop ?

The loan had been made and the two bonds executed on the 18th June, 1875. At some time after that and before the end of 1876 Lachman Das, under circumstances most strongly indicative of fraud, sold to the defendant Ali-ud-din out and out, for a sum of Rs. 9,500, the mauza of Chand Khera, concealing the hypothecation already made to the plaintiff, and acting as if the property were free and unincumbered and capable of disposal. It is impossible to avoid making the remark in passing, that it seems very strange that the defendant Ali-ud-din, a pleader, who could readily have searched the district register of charges on immoveable property, never took the precaution to do so, though by this simple and to him necessarily well understood proceeding, he might have ascertained, what only came accidentally to his knowledge, namely, that the very mauza he had bought was already incumbered to the plaintiff at the time of his purchase. Naturally Ali-ud-din, when he became aware of the cheat that had been practised on him, was very indignant and threatened Lachman Das with prosecution, who in his alarm to escape from the consequences of one fraud, seems to have thought the best way out of his difficulty was to commit another. For this purpose he opened communications with the plaintiff, the object of which was to induce him to accept 2½ biswas of mauza Kelsa, a shop, and a note of hand of the treasurer of Rampur, in lieu of mauza Chand Khera. A proposal to this effect embodied in writing appears to have been prepared and forwarded by Lachman Das on or about the 16th December, 1876, but no formal signature of the plaintiff to it was ever obtained, and it was not till the 3rd May, 1877, that a letter was written by the plaintiff to the defendant Ali-ud-din, by the terms of which it is contended the document of December, 1876, was accepted and Chand Khera was exempted from

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the bond of the 18th June, 1875. According to Ali-ud-din, this set at rest all his fears, he was content to let his bargain with Lachman Das stand, and abandoned his threatened prosecution. If his mind was so completely set at rest by the plaintiff, it seems strange, to say the least of it, that on the 1st July, 1877, he requested Lachman Das to execute a deed of agreement, which, after recapitulating all the circumstances relating to the sale, proceeded to hypothecate certain properties as security for the carrying out the contract. The remaining facts to be enumerated are but few. It turned out that the 2½ biswas of mauza Kelsa which Lachman Das had put forward as his own did not belong to him but to his minor nephew, and it is curious to observe, in his judgment, that the Subordinate Judge seems to have studiously kept this, the most important fact, in the back ground. The real struggle now is necessarily between the plaintiff and Ali-ud-din, indeed, as parties to the suit, the other defendants may be dismissed from our consideration.

The suit brought by the plaintiff is on his bond of June, 1875, and he claims to enforce the hypothecation against Chand Khara as if the documents of December, 1876, and 3rd May, 1877, had never been written. The defendant Ali-ud-din, who is in possession of Chand Khara under his purchase, put forward those two documents as evidence of his title and showing that the plaintiff released Chand Khara from the bond of 18th June, 1875. One of the pleas in appeal sets up a technical objection to the admission of the letter of the plaintiff of the 3rd May, 1877, and it was argued before us that, having regard to the terms of the deed of December, 1876, to which this referred and expressed its acceptance of, this document must be considered a release, or, in other words, an instrument "purporting to extinguish a contingent interest to and in immovable property" and as such, not only liable to stamp but to registration under s. 17, Act III of 1877. We are of opinion this contention is correct and that the letter does amount to a release. It was in that very sense and for the purpose of fixing responsibility on the plaintiff as to the exemption of Chand Khara from the bond, that the defendant Ali-ud-din tenders it, and indeed without it, it is not very easy to see what sort of defence he could have made. The document therefore ought to have been stamped and registered and should not have been admitted in evidence in

the lower Court, though it does not seem that there any objection was taken. But it does not appear necessary to the decision of the case for us to pass any formal or deliberate expression of opinion upon these two questions, so far as they are made matter for objection to the admissibility of the release of the 3rd May, 1877, in this Court. As to its acceptance in proof without stamp, there is a judgment of Sir Barnes Peacock in *Mark Ridded Currie v. S. V. Mutu Ramen Chetty* (1), wherein acting upon the terms of s. 350, Act VIII of 1859, with which s. 578, Act X of 1877, closely corresponds, he held "that the error, if any, of receiving the document without a stamp, did not affect the merits of the case or the jurisdiction of the Court, although it might have affected the Government revenue." It should, however, be noticed that this decision only disposes of the objection within the terms of s. 350, so far as it was a fit ground for appeal from the finding of the lower Court. The difficulty that presents itself to our minds is as to how far this Court, sitting in appeal from an original decree and therefore having to deal with evidence as well as law, can fail to notice an objection to its receiving as proof and taking cognizance of a document which is both unstamped and unregistered? It may be, that so far as it relates to the finding and order of the lower Court it has no force, but "non constat" that when brought under our notice we are not to entertain it. So to the question of registration the same observations apply, only with greater force, for registration can hardly be called a matter "affecting the Government revenue," when it is obviously intended to prevent fraud by parties to instruments of a certain description. Upon this point a decision of West and Pinhey, JJ., in *Basawa v. Kalkapa* (2) was quoted, which seems to bear directly upon the whole subject of registration and to treat it from a practical and intelligible point of view. We must not, however, be taken as expressing any definitive opinion upon these two questions, though it is irresistible to remark that at first sight the argument seems a strange one, as has been before remarked, that a Court of Appeal, where it is dealing with fact as well as law, is to accept and treat as evidence that which two Acts have in prohibitory language declared shall not be received. Upon one point, however, we feel no doubt, namely, that an objection may properly be taken in this Court to an unstamped document and that

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(1) 3 B. L. R., 126. (2) I. L. R., 2 Bom., 439.



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we are bound to entertain it. In that case we may direct that the document be stamped and the penalty imposed, but for the unregistered instrument there is no "*locus penitentie*," if the time has run out within which it should have been presented for registration, and we are powerless to give any assistance. We have already said that, for the purpose of our disposing of this appeal, it does not appear to us necessary to express any final opinion upon these two questions, indeed from our point of view and the conclusion at which we have arrived we think it sufficient to deal with the case upon the first ground of appeal. Our judgment would have been the same whether the letter of the 3rd May, 1877, be shut out or admitted. But with the object, as far as lies in our power, of finally disposing of the litigation, we have accepted that document as part of the evidence in the case, and have accorded to it all the importance and weight requested by the respondent Ali-ud-din. Even had the agreement, as it is called, of the 16th December, 1876, been signed by the plaintiff, it would have made no difference, to our minds, in the result of this appeal, and this for the very simple reason, that the fraud of Lachman Das, by whose misrepresentations and false pretences as to the 2½ biswas of mauza Kelsa, the plaintiff was induced to substitute them for the twenty biswas of mauza Ohand Khera, vitiates the whole transaction, documents and all, and restores to operation in its precise terms the bond of the 18th June, 1875, with its appended security. That there was positive, direct, and deliberate fraud, and that it acted immediately and directly on the mind of the plaintiff is a matter beyond all controversy, and how would it be possible for us as a Court of Equity, as well as of Law, to allow such a contract, whether verbal or written, under such circumstances to stand? It is abundantly clear that the plaintiff would never have altered his security had he been aware that he was surrendering twenty biswas for 2½ biswas, as to which his hypothecator had no title, and his whole action in the matter, as deposed to by the witnesses, goes to show that he implicitly believed in the honesty and *bona fides* of Lachman Das. We fail altogether to remark any laches or negligence of any sort on the part of the plaintiff to disentitle him to the relief he asks, on the contrary he appears to have acted in a perfectly straightforward way and to have fallen a victim to the falsehoods of a clever cheat, who was driven to his wit's end to escape from prosecution and, as it would

seem, from well merited conviction. That Ali-ud-din had still some suspicions about Lachman Das, after his receipt of the letter of the plaintiff's of the 3rd May, 1877, is plainly evidenced by the agreement of the 1st July of the same year, but this has in no way affected us in our view of the facts or the decision of the case, though it is a strong indication that the defendant Ali-ud-din had considerable doubt as to the safety of his purchase. That Ali-ud-din has his remedies, either in the Civil or Criminal Courts, or both, is a matter beyond dispute, but however *bona fide* his purchase, he cannot set it up to defeat the lien of the plaintiff on mauza Chand Khara under his bond of 18th June, 1875, in satisfaction of the amount and to the extent, for which, it will, with the other properties hypothecated, share as security. The fraud of Lachman Das towards the plaintiff goes back to the inception of the transaction and renders all subsequent proceedings in reference to the property in suit void and of no effect.

The appeal will therefore be allowed and the decision of the lower Court reversed, so far as relates to its order exempting mauza Chand Khara from the operation of the bond of 18th June, 1875. For purposes of convenience and to avoid mistakes we think it best to say in terms, that a decree is passed in plaintiff's favour for Rs. 20,000, and interest to this date, at the rate specified in the bond, against Mir Afzal Ali, Lachman Das, and Ali-ud-din, by enforcement of lien against twenty biswas of mauza Chand Khara, two and a half biswas of mauza Kelsa, and twenty biswas of mauza Ismailpur, as specified and defined in the schedule to the bond of 18th June, 1875, and thereby hypothecated. The whole of the costs in this and the lower Court are to be paid by Lachman Das.

*Appeal allowed.*

*Before Mr. Justice Pearson and Mr. Justice Olfeld.*

AUDH KUMARI AND OTHERS (DEFENDANTS) v. CHANDRA DAI (PLAINTIFF)  
AND PRAN DAI AND SITA DAI (DEFENDANTS).\*

1879  
December 15.

*Hindu Law—Right of succession of daughters to father's estate.*

*Held* that comparative poverty is the only criterion for settling the claims of daughters on their father's estate. *Bakubai v. Manchhabai* (1) and *Poli v. Narotam Bapu* (2) followed.

\* First Appeal, No. 55 of 1878, from a decree of Maulvi Sultan Hussain, Subordinate Judge of Gorakhpur, dated the 9th February, 1878.

(1) 2 Bom. H. C. R. 5. (2) 6 Bom. H. C. R. 183.

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Where, therefore, two of four daughters brought suits claiming each a moiety of their father's estate, to the exclusion of the two remaining daughters, and such remaining daughters resisted such suits on the ground that they were entitled to the whole estate, being poor and needy, while their sisters were rich, and it was found that such remaining daughters were, as compared with their sisters, poor and needy, the Court dismissed such suits.

CHANDRA Dai, a daughter of one Bishan Prasad, deceased, who died without leaving male issue, sued certain persons for the possession of a moiety of her deceased father's separate immoveable property, claiming by right of inheritance. Son Dai, another daughter of Bishan Prasad, also sued the same persons in like manner for the remaining moiety of such property. The defendants set up as a defence to these suits, amongst other things, that Bishan Prasad had two other daughters, Pran Dai and Sita Dai, and that such daughters, being in indigent circumstances, were entitled to the estate of Bishan Prasad to the exclusion of Chandra Dai and Son Dai, who were persons of wealth, and that Bishan Prasad having four daughters, Chandra Dai and Son Dai had no right to moieties of his property. While these suits were pending Pran Dai, who was admittedly a daughter of Bishan Prasad, and Sita Dai preferred petitions to the Court of first instance, in which they respectively claimed to be entitled to the whole estate of Bishan Prasad. The Court of first instance did not make them parties to the suits, but, hearing the suits together, gave Chandra Dai and Son Dai decrees against the defendants in these terms: "That decrees be given in favour of the plaintiffs, but so as not to interfere with the rights of the other daughters." On appeal by the defendants to the High Court, the Court remanded the suits to the Court of first instance, directing it to make Pran Dai and Sita Dai defendants, and to determine whether Sita Dai was a daughter of Bishan Prasad, and whether either Chandra Dai or Son Dai had any right of inheritance as against Pran Dai or Sita Dai, and, if any, what was the extent of such rights. Pran Dai and Sita Dai were accordingly made defendants in these suits. Pran Dai set up the same defence to both suits, viz., that she was entitled to succeed to the whole of her father's estate. In her written statement she stated her reasons for being so entitled as follows: "The defendant is utterly indigent and she is a widow: she is so necessitous that she is unable to procure the necessities of daily life—food and clothing: Chandra Dai and Son Dai are very

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wealthy, while Sita Dai, who is poor as compared with Chandra Dai and Son Dai, is in better circumstances than the defendant, and her husband is alive : under these circumstances the defendant is, under Hindu law, the sole heir to her father's estate ; in her presence Chandra Dai and Sita Dai cannot be regarded as heirs and entitled to their father's property." Sita Dai set up a similar defence to the suits, stating in her written statement as follows : " The defendant is utterly indigent and destitute : as against her Chandra Dai, or Son Dai, or Pran Dai, her sisters, who are wealthy have no right : Bishan Prasad gave Chandra Dai and Son Dai an estate of considerable value, besides jewels and money : he also gave Pran Dai an annuity of Rs. 25 : the defendant alone is destitute, and her husband's family is very poor : under these circumstances the defendant alone is entitled to succeed to her father's estate." The Court of first instance found on the issues remanded to it that Sita Dai was a daughter of Bishan Prasad. With reference to the question whether Chandra Dai or Son Dai were entitled to a share in the estate as against Pran Dai and Sita Dai, the Court observed as follows : " In the opinion of this Court the four daughters have equal rights: the word indigent (*nirdhan*), as understood in the Hindu law, is not applicable to any of the four daughters : Sita Dai and Pran Dai have already been held by this Court not to be paupers : as none of the four daughters is *nirdhan*, it is not necessary for the Court to see that the husband of one is possessed of less property than that of the others : if in determining the question of indigence and wealth regard were had to the amount of money and property possessed comparatively by different parties, and the person who possessed more was regarded wealthy, and one who possessed less indigent, every person would be indigent with reference to the person who was in better circumstances than he, and wealthy with reference to the person who was in worse circumstances : thus there would be hardly any person to whom the words wealthy and indigent would not be equally applicable : therefore the contention that the plaintiffs are wealthy is useless : in the same manner, the allegations of Sita Dai and Pran Dai as to their comparative indigence are undeserving of consideration : the fact is, that none of the four daughters lack the necessities of life, that is, no one of them is so poor as to be unable to procure food : no one of the four lives by

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begging, the word *nirdhan* means an indigent person who may have been reduced to starvation."

On the return of these findings the High Court delivered the following judgment in the suit brought by Chandra Dai :

The *Senior Government Pleader* (Lala Juala Prasad), *Munshi Sukh Ram*, and *Maulvi Mehndi Hasan*, for the appellants.

*Pandit Ajudhia Nath* and *Lala Lalta Prasad*, for the respondents.

PEARSON, J.—We consider it to be well established by the evidence on the record that Sita Dai is the daughter of Bishan Prasad and sister of the plaintiff in the connected suit. The lower Court's finding on the point appears to be quite right, and the objection taken to it by the plaintiff, respondent, is disallowed. It is also well established, in our opinion, that the plaintiff in this suit as well as her sister, the plaintiff in the other suit, are in much better circumstances than their sisters Pran Dai and Sita Dai. The two plaintiffs married two brothers, sons of Bindesri Prasad, Pandey, who was a man of considerable wealth, to shares in which their husbands have succeeded. At the time of their marriage Bishan Prasad made over a valuable estate, known as Sitapur, comprising 811 acres, to Bindesri Prasad aforesaid, for their maintenance. It appears, however, that the estate really remained in Bishan Prasad's own possession until his death in 1877, and that the profits of it were given to them. Their husbands possess considerable property and keep horses and elephants. On the other hand it is shown by the evidence that Pran Dai is a widow, whose husband pre-deceased his father, and who now lives with her mother, and has very scanty means of subsistence. Her husband's father was apparently a poor man. Sita Dai's husband is alive, and has some extremely minute shares in several villages, which yield a profit of about Rs. 21 per annum altogether, and it is in evidence that his shares in nine out of the twelve villages are encumbered with a mortgage. There can be no doubt, we think, that Pran Dai and Sita Dai are, as compared with their sisters, the plaintiffs in these suits, poor and needy. The lower Court has ruled that, inasmuch as they are not beggars, they are not so indigent as to be entitled, under Hindu law, to succeed to

the property in suit, the estate left by their father, in preference to and by exclusion of their more affluent sisters. In that ruling we are not prepared to concur. The original Sanskrit word which has been translated indigent has also been translated unprovided and unendowed. Commentators are said to differ as to whether provision or endowment by a father or by a husband is meant. Without deciding the controversy we may observe that the plaintiffs in these suits have abundant provision made for them both by their father and by their husbands, while their sisters have not been similarly provided for. We find that in two cases which have been brought to our notice, decided by the Bombay High Court, *Bakubai v. Manohabbai* (1) and *Poli v. Narotum Bapu* (2), it has been held that comparative poverty is the only criterion for settling the claims of daughters on their father's estate. Accepting the view of the law taken by the Bombay High Court as correct, we have no alternative but to decree the appeal and dismiss the plaintiff's suit with costs.

*Appeal allowed.*

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

KURAY MAL AND OTHERS (DEPENDANTS) v. PURAN MAL (PLAINTIFF).\*

1879  
December 15.

*Joint mortgage—Purchase by mortgagee of a share in mortgaged property—Redemption of mortgage.*

Where all the proprietors of an estate joined in mortgaging it, and the mortgagee subsequently purchased the share in such estate of one of the mortgagors, thereby breaking the joint character of the mortgage, and one of the mortgagors sued to redeem his own share and also the share of B, another of the mortgagors, held that he was entitled to redeem his own share, but he could not redeem B's share against the will of the mortgagee.

On the 27th January, 1843, the proprietors of a certain estate jointly mortgaged such estate to one Bhajan Lal. On the 12th July, 1871, the mortgagees purchased the share of Durabi, one of the mortgagors, in such estate. The plaintiff in this suit sued the mortgagees claiming to redeem the share in such estate of one of the mortgagors which he had purchased, and also the share of one

(1) 2 Bom. H. C. Rep. 5. (2) 6 Bom. H. C. Rep. 183.

\* Second Appeal, No. 577 of 1879, from a decree of S. S. Melville, Esq., Judge of Meerut, dated the 28th January, 1879, modifying a decree of Maulvi Asmat Ali, Munsif of Bulandshahr, dated the 3rd July, 1878.

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Badipan, another of the mortgagors. The defendants contended that the plaintiff was not entitled to redeem the share of Badipan. The Court of first instance held that the plaintiff was entitled to redeem that share and gave him a decree as claimed. On appeal by the defendants, the lower appellate Court also held that the plaintiff was so entitled.

The defendants appealed to the High Court, again contending that the plaintiff was not entitled to redeem Badipan's share.

Pandit *Nand Lal*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

The following judgments were delivered by the Court :

SPANKIE, J.—The judgment of the lower appellate Court appears I think open to the objection taken. The pleader for the appellants refers to a decision of the Privy Council which, however, he did not cite in support of his arguments. The precedent of this Court, *Mahtab Singh v. Misree Lal* (1), to which we were referred, does not affect the case before us in any direct way. I was at first disposed to consider that the decision in *Nawab Azimut Ali Khan v. Jowahir Singh* (2) was one which applied injuriously to the appellants' case. But on looking into the case, in which I was a party to the judgment, I find that the decision of the Judicial Committee of the Privy Council overruled the latter part of the judgment. It further appears that the decision of the Privy Council to which appellants refer is that in the case of *Nawab Azimut Ali Khan v. Jowahir Singh* (3) which is the very case to which I have alluded above.

I gather from the judgment of the Privy Council on the point now at issue that in respect to shares in which a mortgagee under a joint mortgage has not himself bought the equity of redemption, he retains his character as mortgagee though he has purchased the equity of redemption in other shares. Thus the plaintiff here, who has become the representative of a mortgagor of a particular share, is entitled to redeem his own particular share in the joint mortgage of which the joint character has been broken up, but he cannot

(1) H. C. R., N.-W. P., 1867, p. 83.

(2) H. C. R., N.-W. P., 1866, p. 3.

(3) 13 Moore's Ind., App., p. 404.

redeem, against the will of the mortgagee, the share of Badipan another shareholder. I would therefore decree the appeal and reverse the decision of the lower appellate Court in so far as it relates to the share of Badipan, and I would modify the decree accordingly with costs in proportion to decree and dismissal.

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OLDFIELD, J.—I concur in the order proposed by Mr. Justice Spankie. The right of one mortgagor to redeem the whole mortgage rests on the joint character of the mortgage, and when that has been broken, the right ceases, and he cannot redeem more than his share against the will of the mortgagee.

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*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

RAMJAS (DEFENDANT) v. BAIJ NATH (PLAINTIFF).\*

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December 16.

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*Hearing of appeal ex parte—Refusal to re-hear appeal—Appeal from Appellate Decree—Act X of 1877 (Civil Procedure Code), ss. 560, 584, 588 (v).*

An appeal was heard *ex parte* in the absence of the respondent (defendant), and judgment was given against him. He applied to the Appellate Court to re-hear the appeal, and the Appellate Court refused to re-hear it. He then appealed, not from the order refusing to re-hear the appeal, but from the decree of the Appellate Court. *Held* that he was not debarred, by reason that he had not appealed from the order refusing to re-hear the appeal, from appealing from the decree of the Appellate Court.

The facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

The *Senior Government Pleader* (Lala Juala Prasad) and Munshi Hanuman Prasad, for the appellant.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the respondent.

The judgments of the High Court, so far as they are material for the purposes of this report, were as follows :

STUART, C. J.—This is a second appeal in a suit brought to recover Rs. 2,926-15-6, principal and interest, from the defendant's person and property under a bond, or rather two bonds dated respectively the 28th November, 1870, and the 8th March, 1876. The

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\* Second Appeal, No. 1083 of 1878, from a decree of C. Daniell, Esq., Judge of Gorakhpur, dated the 17th June, 1878, reversing a decree of Maulvi Sultan Husain, Subordinate Judge of Gorakhpur, dated the 22nd December, 1877.



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reasons of appeal are exclusively on the legal merits of the case, and there is not in them the slightest allusion to any peculiarity of procedure before any of the Courts below. It is, however, now objected on behalf of the respondent that the present appeal does not lie, inasmuch as the last order by the Judge was one refusing to re-hear the appeal before him under s. 560 of the Code of Civil Procedure, against which order the appellant might have appealed to this Court, and not having done so, he cannot now prefer a second appeal from the decree of the Judge on the merits of the case. What actually occurred was this :—The Subordinate Judge, by a decision dated the 22nd December, 1877, dismissed the suit, and the case then went on appeal to the Judge, the defendant not appearing in that appeal. The Judge, nevertheless, heard the appeal *ex parte* on the merits, and by a judgment dated the 17th June, 1878, reversed the decision of the Subordinate Judge, remarking at the end of his judgment that “the respondent had the ordinary notice served on him of the appeal having been made, but he has failed to defend it.” Instead of at once appealing to this Court, as he might have done under s. 534 of the Code, against the Judge’s order, the defendant applied to the Judge for a re-hearing of the appeal to him, under s. 560, and the Judge, for reasons which do not appear, excepting that the defendant had not attended to the notice of appeal served upon him, refused to re-hear the appeal, and it is argued that by this procedure the plaintiff is prevented from falling back on the Judge’s first judgment on the merits of the case and preferring the present second appeal to this Court.

I am, however, clearly of opinion that such an objection is untenable. S. 560 of the Code of Procedure is not mandatory, but permissive and discretionary. It provides that “when an appeal is heard *ex parte* in the absence of the respondent, and judgment is given against him (exactly as happened here), he may apply to the Appellate Court to re-hear the appeal.” The proceeding indeed evidently contemplated by this section is merely an additional privilege or facility given to respondents, who may or may not avail themselves of it, but it in no way interferes with respondents in other respects, nor could it have been intended to deprive them of any other rights of procedure to which under the Code they are entitled, such as their right of second appeal under s. 534 of the Code; and

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there certainly is not the slightest indication in s. 560 of any such intention. The objection therefore altogether fails. I may add that I have the less hesitation in coming to such a conclusion in the present case, since after a very careful examination of the record I cannot find that the requirements of s. 560 were duly observed by the Judge when he refused to re-hear the appeal to him. There is a proceeding before the Judge dated the 19th August, 1878, reciting the application for a re-hearing, and it does not appear from this proceeding that the respondent was allowed the opportunity provided by s. 560 of proving that he was prevented by sufficient cause from attending when the appeal was called on for hearing, all that the Judge's order states being that he was "satisfied that notice was duly served and that the respondent had received full information regarding the appeal," without a word relating to the important question whether sufficient cause had not been shown by the respondent for not attending when the appeal was called on for hearing. The reason assigned by the Judge was clearly not enough, for although notice had been served and the respondent was fully aware that the appeal was coming on, he yet might have been able to show sufficient cause for his absence, and if so he had a clear right to have the appeal re-heard. It is satisfactory, therefore, in the interests of justice, that the present appeal has been preferred, and of its competency I have not the least doubt.

SPANKIE, J.--Pandit Bishambhar Nath, for respondent, took a preliminary objection to the hearing of this appeal. It appears that the case was decided originally *ex parte* on the 17th June, 1878, by the Appellate Court. Ramjas, defendant (now appellant), petitioned the Court for a re-hearing of the appeal. But the Court held that notice had been duly served upon him, and that he had had full information that the appeal had been filed. The Judge, therefore, refused to re-hear the case. It is urged that the defendant should have adopted the course provided by cl. (v), s. 588, Act X of 1877, that is to say, he should have appealed to this Court from the order of the Judge refusing under s. 560 of the Act to re-hear the appeal: as he did not follow this course defendant cannot appeal from the Judge's decision of the 17th June, 1878.

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The terms of s. 560 of Act X of 1877 are permissive. When an appeal is heard *ex parte* in the absence of the respondent, and judgment is given against him, he may apply for a re-hearing, and if it be proved that the respondent was prevented by sufficient cause from attending when the appeal was called on, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him. From any order refusing to re-hear an appeal there is an appeal under s. 538, cl. v, but the appeal is not from the decree passed in appeal, but from the order of refusal to re-hear it, if a petition to that effect has been filed and rejected. The decree in appeal remains in force. I do not find it anywhere laid down in the Code that there shall be no appeal from a decree passed in appeal *ex parte*. By not appealing from the order rejecting his application for a re-hearing, respondent might have lost the opportunity of getting his case more completely heard by the Appellate Court, and thereby he may have placed himself in an unfavourable position before this Court, if he desired to appeal from the lower appellate Court's decree on the appeal, still I do not see that he is debarred from instituting a second appeal, provided he undertakes to show that the decree is open to objection on any of the grounds mentioned in s. 584 of Act X of 1877. I would therefore reject the preliminary objection.

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December 31.

## CRIMINAL JURISDICTION.

*Before Mr. Justice Straight.*

EMPRESS OF INDIA v. BHUP SINGH AND ANOTHER.

*Act X of 1872 (Criminal Procedure Code), ss. 44, 296—Discharge of accused persons under s. 215—Revival of Proceedings at the instance of the Court of Session—Commitment of accused persons.*

Certain persons were charged under s. 417 of the Indian Penal Code, and were discharged by the Magistrate inquiring into the offence, under s. 215 of Act X of 1872. The Court of Session, considering that the accused persons had been improperly discharged, forwarded the record to the Magistrate of the District, suggesting to him to make the case over to a Subordinate Magistrate, with directions to inquire into any offence, other than the offence in respect of which the accused persons had been discharged, which the evidence on the record showed to have been committed. The Subordinate Magistrate to whom the case was made over made an inquiry, and committed the accused persons for trial before the Court of Session.

on charges under ss. 363 and 420 of the Indian Penal Code. It was contended that the Court of Session was not competent to "direct the accused persons to be committed," under s. 296 of Act X of 1872, the case not being a "Sessions case," within the meaning of that section, and that the commitment was consequently illegal. *Held* that there was no "direction to commit" within the meaning of that section, that is to say, to send the accused persons at once to the Sessions Court, without further inquiry, and whether or not the inquiry was made in consequence of the suggestions of the Court of Session was immaterial, and that the inquiry upon the charges under ss. 363 and 420 of the Penal Code was rightly held by the Subordinate Magistrate and the commitment could not be impeached.

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THIS was a reference by Mr. W. C. Turner, Sessions Judge of Agra, under s. 296 of Act X of 1872, for the orders of the High Court. The facts of the case are sufficiently stated in the order of the High Court.

Mr. Colvin for the accused persons.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown.

STRAIGHT, J.—In this case the two accused persons were originally charged before Mr. Hewitt, Assistant Magistrate of Agra, at the instance of one Bhagwan Singh, under s. 417 of the Penal Code. After investigation the prosecution failed and a discharge was passed under s. 215, Criminal Procedure Code, the Assistant Magistrate at the same time making an order for compensation against Bhagwan Singh, on the ground that his complaint was frivolous and vexatious. Against this order for compensation and of discharge, Bhagwan Singh appealed to the Court of Session, and the then Officiating Judge, Mr. Gardner, having made some remarks in writing on the case, remitted the record to the Magistrate of the District, who made the case over to Kedar Nath, Deputy Magistrate, who then proceeded with an inquiry against Bhup Singh and Umrao Singh, based upon ss. 363 and 420 of the Penal Code, ultimately committing them for trial to the Court of Session. On the 11th of October the order for compensation passed against Bhagwan Singh by Mr. Hewitt was quashed by this Court, having been made in a case other than a summons case and therefore being *ultra vires*. The committal of Bhup Singh and Umrao Singh having taken place on the 30th of September, the case came on for hearing at the Sessions Court on the 22nd November, when objection was taken to the jurisdiction of the Judge to try it, on the

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ground that the commitment was informal and illegal, having been made in consequence of the remarks in writing of the Officiating Sessions Judge of the 26th July, which virtually amounted to a "direction to commit" under s. 296, Criminal Procedure Code, and had been so regarded: this direction the Judge had no power to make, the offences charged against Bhup Singh and Umrao Singh not being "Sessions cases", or in other words "exclusively triable by a Court of Session." Upon this objection, taken "*in limine*", the Sessions Judge declined to proceed with the case and remitted the whole of the proceedings and papers to this Court with the object and intention, I presume, that the commitment should be quashed.

The case for the accused, or in other words in support of my setting aside the proceedings against them, has been very fully and ably argued by Mr. Colvin, though the whole of his contention has been based on an entire misconception of the character of the document of the 26th of July. I am clearly of opinion that it is not nor was it ever intended to be a "direction to commit". On the contrary, as far as I understand its terms, the Officiating Sessions Judge carefully guarded himself against making any order of that kind and simply relegated the record to the Magistrate of the District, for him to take such steps in the matter as he might think proper. The Magistrate upon consideration of the facts appearing in the evidence, under s. 44, Criminal Procedure Code, referred the case for investigation to his subordinate Kedar Nath, who had full power to hold the necessary inquiry, and, if he considered the case one that ought to be tried by the Court of Session, to commit it thereto in accordance with the provisions of s. 196, Criminal Procedure Code. Whether that investigation did or did not take place in consequence of the remarks of the Officiating Sessions Judge of the 26th July appears to me quite immaterial: there was no "direction to commit" in the sense of s. 296, Criminal Procedure Code, that is to say, to send the discharged accused at once to the Sessions Court, without further inquiry. The observations of the Judge, which it was quite competent for him to make under the proviso at the end of s. 296, Criminal Procedure Code, even if they did amount to a "direction", seem to suggest to the Magistrate of the District, that he should, as he properly might, direct the Sub-

ordinate Court to inquire into any offence, other than that on which the order of discharge had been passed, which the evidence on the record showed to have been committed. It appears to me that the inquiry upon the charges under ss. 363 and 420 of the Penal Code were rightly held by the Deputy Magistrate, and that there is no pretence for impeaching his commitment. The cases of *Queen v. Seetul Pershad* (1), and *Petition of Mohesh Mistree* (2), are clearly distinguishable from the present, and my view of this matter in no way involves disagreement with any of the authorities quoted. The records are returned to the Sessions Judge, and he is directed to proceed with the trial of the accused Bhup Singh and Umrao Singh, under ss. 363, 420 and <sup>109</sup>/<sub>420</sub>, in ordinary course.

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## FULL BENCH.

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August 27.

*Before Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.*

SUGRA BIBI (PLAINTIFF) v. MASUMA BIBI (DEFENDANT).\*

*Muhammadian Law—Dower.*

Where a Muhammadan (Shia), on his marriage, being in poor circumstances, fixed a "deferred" dower of Rs. 51,000 upon his wife, and died without leaving sufficient assets to pay such dower, and his wife sued to recover the amount of such dower from his estate, *held* by STUART, C. J., (PEARSON, J. dissenting) that, it being nowhere laid down absolutely and expressly by any authority on the Muhammadan law that, however large the dower fixed may be, the wife is entitled to recover the whole of it from her husband's estate, without reference to his circumstances at the time of marriage or the value of his estate at his death, the plaintiff was only entitled, under the circumstances, to a reasonable amount of dower.

*Held* by the Full Bench, on appeal from the decision of STUART, C. J., that a Muhammadan widow was entitled to the whole of the dower which her deceased husband had on marriage agreed to give her, whatever it might amount to, and whether or not her husband was comparatively poor when he married, or had not left assets sufficient to pay the dower-debt.

THIS was a suit in which the plaintiff, the widow of one Tasadduk Husain, deceased, sued *in formâ pauperis* the defendants, the mother, brother, and two sisters of the deceased, his heirs, claiming

(1) H. C. R., N.-W.P., 1878, p. 168 :  
see also *Empress v. Kanchan Singh*,  
L. L. R., 1 All., 413.

(2) I. L. R., 1 Calc., 282.

\* Appeal under cl. 10, Letters Patent, No. 3 of 1877. Reported under the special orders of the Hon'ble the Chief Justice.

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to recover from his estate Rs. 51,000, being the amount of her "deferred" dower. The defendant Masuma Bibi, mother of Tasadduk Husain, set up as a defence to the suit that Tasadduk Husain had settled a dower on the plaintiff "equal to the dower settled on Fatima, viz., ten dirms, or Rs. 107, according to the law of Imamia prevailing among the Shias," to which sect the parties belonged. She alleged in her written statement as follows:—"In fact all the members of the plaintiff's family and that of Tasadduk Husain have acted all along in accordance with this custom: at the time of Tasadduk Husain's marriage his circumstances and those of his father and the family of the plaintiff were not in such a state as to admit of fixing the dower at such a large amount, the payment of which was impossible: if it was fixed it was merely for the sake of show, its payment not being intended." The Court of first instance found as a fact that the amount of dower settled on the plaintiff was Rs. 107, the material portion of its judgment being as follows:—"Although such a large sum of money is said to have been settled on plaintiff as dower, no deed of settlement is forthcoming: it is proved that Tasadduk Husain possessed no independent means at the time of his marriage with plaintiff, and had not commenced practising as a pleader: his father, who was employed as a mukhtar or agent in Azamgarh, although possessed of some property, was not in a position to settle a dower of Rs. 51,000 on his son's bride: nor is there any conclusive evidence to show that this was the proper dower of female members of the family of plaintiff's father: under these circumstances, I am unable to credit the statements of the plaintiff's witnesses, that Tasadduk Husain at once agreed to settle the above-mentioned dower on plaintiff, and incline to accept the testimony of defendant's witnesses, who unanimously testify that the dower of Fatima, or about Rs. 107, was settled on plaintiff, an amount which appears to be more reasonable and suited to the then circumstances of the parties: among the plaintiff's witnesses is her maternal uncle, Nisar Husain, whose testimony appears to be very exaggerated, and who declares that similar amounts of dower were invariably settled on each and every female member of the family of the bride and bridegroom, which appears to be absurd and is rebutted by the evidence of defendant's witnesses, who deny his presence at the time of the marriage-contract, and he moreover is shown to be biassed against

defendants : I therefore find as a fact that the amount of dower settled on plaintiff was Rs. 107 and not Rs. 51,000, and that the first defendant, who has succeeded to the estate of the deceased, is liable to pay it."

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The plaintiff appealed from the decree of the Court of first instance to the High Court. The appeal came for hearing before a Division Bench composed of Stuart, C. J., and Pearson, J., by whom the following judgments were delivered :

STUART, C. J.—This is one of those extraordinary and embarrassing cases which the Muhammadan law offers as puzzles to the European mind. The plaintiff, appellant, is a pauper, and as such she sues to recover no less a sum than Rs. 51,000 from the estate of her deceased husband, although that estate, it was well known when the suit was brought, amounted only to something between rupees two and three thousand. Now, in any system of law appealing to one's sense of justice and claiming in that respect, I do not say respectful, but intelligible acceptance among rational beings, one would suppose that as regards the two sums I have named a Court of Law might be permitted to exercise a discretion by means of which the widow's claim might be reduced to the possibilities of the case. But it would appear that we are not allowed so to escape from a hopeless and helpless dilemma, for we are told that we must either give this pauper plaintiff Rs. 51,000, or Fatima's portion of 10 dirms amounting to Rs. 107. There is, it seems, no middle course. We are not even to substitute for the Rs. 51,000 the whole of the husband's estate of two or three thousand rupees, much less to apportion her such a sum as under such circumstances European widows are obliged to be content with. Such a case appears to be beyond the reach of intellectual apprehension, the suggested law is visionary, and the facts are of a somewhat intangible character.

But as to the facts, they appear to be these : The parties and their families were and are Shias. The plaintiff was married to her husband, Tasadduk Husain, on the 7th May, 1843, and the marriage subsisted until the 26th July, 1874, when Tasadduk Husain died. At the time of his marriage with the plaintiff, he settled upon her, according, it is said, to the custom of the family, a dower of Rs. 51,000,



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although at the time he possessed no independent means of his own, and had even then not been admitted as a pleader, although he afterwards appears to have practised in that professional position with some little success. What was the exact extent and value of the property he left at his death does not very clearly appear. One witness states that his profits were between four or five hundred rupees a year, and it is not unlikely that by means of professional savings and property inherited from his father, who, it is stated, practised as a mukhtar, Tasadduk Husain may have left behind him some two or three thousand rupees. It is, however, unnecessary to consider these and other figures of a similar kind, for the rule of the Muhammadan law which we are asked to recognise and administer in this case is one that puts the case quite beyond the limits of arithmetic in any aspect. Here is a case in which a woman, herself a pauper, seeks to recover dower to the extent of Rs. 51,000, although when the settlement of this dower was supposed to be made, the husband, the settler, had not a rupee in the world to call his own. Nevertheless the claim is stated to be justified by the Muhammadan law among the Shias, which, it is said, places no limit to the maximum of dower, no matter what the extent of the husband's estate may or may not be, or whether he had any estate at all. Now, even if such were really and undoubtedly Muhammadan law among Shias, I trust I may be pardoned if I hesitate to admit that it would be reasonable to expect the Judges of a High Court to administer such a law. But although it was strongly urged at the hearing that such was unquestionably sound Muhammadan law, I have not for myself been able to discover any rule of the kind so absolutely laid down in any recognised authority, whether Shia or Sunni. In Baillie's well-known Digest of Muhammadan law, published in 1865, dower is said to be "incumbent" on a husband; but how can it be incumbent on him that is imposed on him as a duty and obligation if the thing to be done is an impossibility, and that it relates to money and property which have no existence, a state of things which by the way that author himself recognises when he expounds that "when something is mentioned as dower which is not in existence at the time, as, for instance, the future produce of certain trees or of certain land, or the gains of a slave, the assignment is bad, and the woman is entitled to her proper

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lower," this "proper dower" being explained to be dower appropriate to the wife's family and social position. But it is further stated in the same work that "dower is unlimited in amount," but it is not said that it is unlimited irrespective of the actual extent and value of the husband's property. On the other hand, I find it laid down in a judgment of the Calcutta Sudder Dewany Adawlat, vol. 1, page 277, that any thing possessing a legal value may be given in dower, that is, of course, a legal value at the time of marriage and settlement. Did the Rs. 51,000 in the present case possess at that time, or did it ever possess, and does it possess now, a legal value? Then in another ruling of the same Court, page 267 of the same volume, it is laid down that the amount of dower is recoverable from the real and personal property left by the husband in preference to the claims of heirs, a ruling which appears to me to disparage and discredit such a dower claim as this. Again in the Tagore Law Lectures of 1873, page 348, it is asserted that property assigned as dower must be specified and in the husband's possession at the time of the assignment, which would otherwise be invalid; a proposition which does not appear to be intended to apply otherwise than to dower generally, whether prompt or deferred. Then in regard to the Shias, we are told by Mr. Baillie in his work on this system published in 1869, page 68, that among them "there are no bounds to the quantity or value of the dower, which is left entirely to the will of the husband and wife, so long as it is capable of appreciation, that is, not totally destitute of value, like a single grain of wheat, for example." But this also is a text which fails to determine the question under consideration within appreciable or intelligible limits. I could understand the doctrine laid down if it meant, or could be understood to mean, quantity or value of dower as a recoverable charge on the husband's estate. Then as to "the will of the husband and wife," such language is surely the idlest verbiage, unless it can be shown that there was something on which the husband and wife's will could be exercised upon. The expression, however, that the dower must be "capable of appreciation, i. e., not totally destitute of value like a single grain of wheat," seems to bring the rule within one's powers of apprehension, although there appears to me to be no reason why the appreciation should not be equally applied to visionary or im-

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possible dower, to the case, for example, of the husband not having himself a single grain of wheat, but yet settling a dower of Rs. 51,000 on his wife. The result, in short, of the authorities appears to be that while some texts might possibly suggest the broad principle contended for in this appeal, it is nowhere laid down absolutely and expressly by any authority on the Muhammadan law that dower, limited or unlimited, is to be regarded without regard to the husband's estate, and that unlimited dower may mean and be accepted as dower of the value, it may be, of ten times the value of that estate, so that her husband at the time of his marriage, although not possessed of a single pice, might yet settle as dower upon his wife lakhs and crores of rupees! Now this is not too extravagant an ideal of the principle of Muhammadan law in question, for as a proposition, it must to that full extent be maintained, supported, and affirmed as Muhammadan law before the plaintiff, appellant, can succeed in this case.

As to the custom on this subject among Shia families, I am not satisfied that such a custom has been satisfactorily proved in this case, but even if it were undoubtedly the practice among Shia ladies, I should hesitate to allow such practice to determine so serious a question. Nor can I recognise, as a sufficient reason for such a practice, that among the Shias a childless widow is precluded from taking any share in the estate of her deceased husband, for surely that is a difficulty that could be met by an express settlement which would give the wife, at the time of the marriage, a reasonable share of, or if you please the whole of, her husband's property. This doctrine, in short, contended for, of unlimited dower infinitely transcends the necessity of the case as stated. But again, in excuse of this alleged singular and anomalous rule as to dower, it is suggested that it is intended to protect Muhammadan wives against the facility for divorce, which can be capriciously used against them by their husbands, seeing that dower takes effect from the wife's divorce or the husband's death. But this explanation I am unable altogether to appreciate, for the consequences of divorce might be fully guarded against by allowing the wife her proper dower, or even such dower as may comprise the whole of the husband's then available estate. Again, it has been said that the amount of the husband's estate, out of which the dower might

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have to be paid, could not be known at the time of the contract. But that does not appear to me to get rid of the difficulty, or I had rather said the preposterous and visionary absurdity of the alleged rule which has no foundation in any rational hope or expectation, but is solely referable to an idle and nebulous fiction which, in the case of parties like those in this appeal, could never be imagined to descend to the earth in the shape of actual cash or property. But it has also been urged that to allow a wife in the name of dower to carry off the whole of the husband's available estate instead of a fixed sum, however large, might have the effect of defeating the rights of the heirs, or, in other words, might finally determine the inheritance of his property. My answer to this, however, is that such a result entirely depends upon the extent of the husband's property, for, as in the present case, a dower might be named so large as hopelessly to absorb the whole property, leaving the heirs with nothing but the mere name of heirs. Altogether I must decline to accept such a view of Muhammadan law, and unless compelled to do so by the supreme ruling of Her Majesty's Privy Council, I must decline to administer or apply it in any case.

In conformity with the tenor of the remarks I have offered, I might have felt disposed to have given the plaintiff reasonable dower out of her husband's estate—say one-third or even half of all the property he left—but that it appears I am not permitted to do. On the other hand, her claim and contention in the suit is so visionary and intangible that I feel unable to reduce her dower to any palpable character or amount beyond the minimum given by the Subordinate Judge. I would therefore affirm the judgment of the Subordinate Judge and dismiss this appeal, but, under the circumstances, without costs.

PEARSON, J.—In my opinion the evidence adduced by the plaintiff is better entitled to credit than the evidence adduced by the defendant, respondent, and the reasons assigned by the Subordinate Judge for his decision of the issue relating to the amount of the dower in question are not valid. Deeds of settlement are not usual, but it is not unusual to settle a dower out of proportion to the means of the husband; probably not many Muhammadans at the time of their marriage are possessed of much independent estate or means.

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The absence of a deed of settlement in this instance, and the circumstance that Tasadduk Husain was not possessed of large means at the time of his marriage, are insufficient grounds for discrediting the claim and the averments on which it is based. Tasadduk Husain would naturally be expected to fix a dower for his wife similar in amount to the dower which had been usually fixed for the ladies of her family on the occasions of their marriage; and that amount is shown to be Rs. 51,000. The plaintiff's witnesses are mostly her relations, but they are persons who are likely to know the real facts in question, viz., what was the usual dower in the family, and what was the dower actually agreed to be given by Tasadduk Husain. Inasmuch as, according to the doctrine of the Shia sect, a childless widow is precluded from taking any share in the estate of her deceased husband, it is not surprising that the relatives of ladies about to be married should stipulate for the settlement on them of a dower that would constitute an adequate provision for them in the event of their surviving their husbands. It may be that the estate of Tasadduk Husain will not furnish more than such a provision for the plaintiff, his widow. I would reverse the lower appellate Court's decree, and decree the claim and appeal with costs recoverable from the estate left by Tasadduk Husain aforesaid.

The plaintiff appealed from the judgment of Stuart, C. J., to the Full Bench, under cl. 10 of the Letters Patent.

Munshi Kashi Prasad and Shah Asad Ali, for the appellant. Munshi Hanuman Prasad, Mir Akbar Husain, and Maulvi Mehdi Hasan, for the respondent.

The following judgments were delivered by the Full Bench :

PEARSON, J.—The first two grounds of the appeal appear to be incontrovertible. The plaintiff is doubtless entitled to the whole of the dower which her late husband agreed to give her, and which was fixed not in reference to his means at the time of marriage, but to the value which she possessed in the matrimonial market, that value being mainly determined by the local position and traditions, the surroundings and antecedents of her family. The contract cannot be set aside or treated as a nullity because he was compara-

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tively poor when he married, or has not left assets sufficient to pay the debt, but on the contrary may be enforced so far as is possible. But in this instance it happens that, if a dower of Rs. 51,000 had not been agreed to by him, she would have been entitled to a dower of that amount, because such an amount has been customarily fixed as dower for ladies belonging to the family of which she is a member. Her claim is maintainable irrespectively of any contract on the part of her husband, but I nevertheless allow in full the third ground of the appeal, and would only add that, as the estate left by Tasadduk Husain is probably not worth Rs. 5,000, it was wholly needless for the plaintiff to have falsely represented her dower as amounting to Rs. 51,000. All that she can gain would be equally gained by representing the amount to have been Rs. 5,000. There is, however, no reason to doubt that her real dower is Rs. 51,000, although she will be unable to realise more than a small portion of it.

With these additional remarks I adhere to my judgment of the 30th April last, and would decree the claim and this appeal with costs in all the Courts.

TURNER, J.—However great the objections which may be taken to it, it is unquestionably the practice for Muhammadan gentlemen to settle on their wives dowers without regard to the extent of their own incomes, and when satisfactory proof is adduced that a settlement of dower has been made *bond fide*, a lady is entitled to enforce her claim for the whole amount, although it may be in excess of the fortune which on her marriage the husband possessed or could have been expected to acquire. No doubt when a large sum is claimed on account of dower, the lady is bound to meet the improbability suggested by the quantity of the claim, but if the evidence produced by her is sufficient to establish the claim, the Court cannot reduce her dower to an amount which it deems reasonable, nor can it refuse her a decree altogether for any sum in excess of the amount which her opponents are willing to concede her. Regard being had to the usage in this country, the dower claimed by the appellant is not preposterously large, that we could on this ground only refuse credit to her witnesses. It is true that large dowers are less common among Shias than among Sunnis,

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but even among the former they are occasionally settled: the usage of the lady's family is perhaps more regarded than adherence to the advice of some of the doctors of the laws.

In the case before us, we consider the appellant's witnesses are more reliable and generally of better position in life than the witnesses called by the respondent. They have sworn, and we see no reason to doubt their evidence, that the appellant's dower was fixed at Rs. 51,000, and in corroboration of their statements on this point they also appear to be stating the truth in asserting that this dower was not in excess of the sum usually settled on ladies of the appellant's family. We would therefore decree the appeal, and reversing the decrees of the Division Bench and of the Court of first instance, decree the claim with costs.

SPANKIE, J.—I agree with the opinion expressed by Mr. Justice Pearson, delivered when the suit was heard by the Division Bench. It appears that there is nothing to add to it. If we believe the evidence for the plaintiff, then the dower was specified, and there was no doubt or uncertainty about it. The weight of evidence is in favour of the plaintiff's case, since the amount fixed is stated by the witnesses, members of the family and others likely to know, to be Rs. 51,000. I would therefore decree the appeal with costs.

*Appeal allowed.*

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July 23.

*Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and  
Mr. Justice Oldfield.*

BABU LAL AND OTHERS (DEFENDANTS) v. ISHRI PRASAD NARAIN SINGH  
(PLAINTIFF).\*

*Res judicata—Mortgage—First and second mortgagees.*

In 1870 *M* granted a certain person a lease of a certain zamindari share, for a term of years, at an annual rent, *L*, as the lessee's surety, hypothecating a mauza called *A* as security for the payment of such rent. In 1871 *L* gave *B* a bond for the payment of certain moneys, hypothecating mauza *A* as security for their payment. In 1872, and again in 1873, *M* obtained a decree in the Revenue Court against his lessee and *L* his surety for arrears of rent. In execution of the decree of 1872 *M* caused *L*'s rights and interests in mauza *A* to be put up for sale, and

\* Appeal under cl. 10, Letters Patent, No. 2 of 1878. Reported under the special orders of the Hon'ble the Chief Justice.

purchased them himself. In 1874 *B* sued *L* and *M* to enforce his lien on mauza *A*. *M* defended this suit on the ground that he was the holder of a prior lien on the property. The Court gave *B* a decree in 1875, holding that he was entitled to an order for the sale of the property, but that it would be competent to *M* to sue to enforce his lien, and that, when he did so, the purchaser under *B*'s decree would have the option of discharging the first incumbrance. The property was accordingly put up for sale in execution of *B*'s decree, and was purchased by *B* himself. In 1876 *M* sued *L* and *B* to enforce his lien on the property, claiming to recover by the sale thereof the amount of the arrears of rent awarded by the decrees of 1872 and 1873, together with the costs awarded him in the Revenue Court, and interest. *Held*, affirming the judgment of STUART, C. J., that the decree of 1875 did not preclude *M* from claiming to enforce his lien on mauza *A*, nor was his claim affected by the circumstance that he had brought to sale in execution of the decree of the Revenue Court the rights and interests of *L* in that mauza. All that was then sold was the equity of redemption, which was sold to satisfy the money-decree held by *M*. No doubt the proceeds of the sale would after satisfaction of the costs of the decree go *pro tanto* to the satisfaction of the sums secured by the first incumbrance, but *M* by selling in execution the mortgagor's equity of redemption did not forego his incumbrance.

*Held* also that *M* could not enforce his lien for the recovery of the costs incurred by him in the Revenue Courts, as the surety-bond did not provide for the payment of such costs; that he could enforce his lien for the recovery of interest, as that bond did provide for the payment of interest; and that the moneys realised by the sale of the equity of redemption of the property in the execution of the Revenue Court's decree of 1872 must be applied, in the first place, in satisfaction of the costs of the suit in which that decree was made, and then in satisfaction of the arrear sued for in that suit, or the balance of that arrear, and of the arrear sued for in the second suit, with interest at the rate agreed upon in the surety-bond from the date of the accrual of those arrears until realisation.

On the 11th May, 1870, the Maharajah of Benares granted a lease of a five annas share in taluqa Kulmayi, in the Allahabad district, to one Bindesri Bakhsh, for a term of eight years to commence from the end of 1277 fasli, at an annual rent of Rs. 14,725 payable by instalments. One of the conditions of this lease was that the lessee should furnish security for the performance of the conditions of the lease. One Lalta Bibi agreed to furnish such security, and as surety executed a deed on the 4th July, 1870, by her husband as her attorney, hypothecating mauza Asravi in pargana Barab, and a mud-built house in mauza Naini in pargana Arail. On the 30th November, 1871, Lalta Bibi joined with her husband in executing a bond for the payment of certain moneys to Babu Lal, Kanhaiya Lal, Shankar Lal, and Ram Charan, and hypothecated mauza Asravi as security for

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such payment. On the 24th September, 1872, the Maharajah of Benares obtained a decree in the Revenue Court against Bindesri Bakhsh, his lessee, and Lalta Bibi, the surety, for Rs. 2,472-12-3, being arrears of rent for 1279 fasli, and Rs. 266-6-4, costs of the suit; and on the 19th December, 1873, he obtained a second decree against them in the Revenue Court for Rs. 1,008-13-3, being arrears of rent for 1280 fasli, and Rs. 131-8-0, the costs of the suit. The rights and interests of Lalta Bibi in mauza Asravi were attached and put up for sale in the execution of the decree dated the 24th September, 1872, and were purchased by the Maharajah for Rs. 1,800. On the 17th September, 1874, Babu Lal and the other obligees of the bond dated the 30th November, 1871, sued Lalta Bibi and her husband on that bond in the Court of the Subordinate Judge of Allahabad, claiming to enforce their lien on mauza Asravi. To this suit they made the Maharajah of Benares a defendant. The Maharajah defended this claim on the ground that he held a prior lien on the property, and that his deed contained the condition that during the continuance of the mortgage the mortgagees would not mortgage the property. On the 28th June, 1875, the Subordinate Judge over-ruled these pleas, deciding that the second mortgagees were entitled to an order for the sale of the property, but that it would be competent to the Maharajah to sue to enforce his lien, and that, when he did so, the purchaser under the decree obtained by the second mortgagees would have the option of discharging the first incumbrance. The second mortgagees consequently obtained a decree for the sale of mauza Asravi, and it was put up for sale, and was purchased by them.

On the 15th June, 1876, the Maharajah of Benares instituted the present suit to enforce his lien on mauza Asravi and the house in mauza Naini, impleading Lalta Bibi, and the second mortgagees. He claimed to recover the amounts of the arrears of rent awarded by the decrees dated the 24th September, 1872, and the 19th December, 1873, respectively, together with the costs awarded to him in the Revenue Court, and interest on the whole sums decreed at the rate of twelve per cent. per annum from the date of those decrees respectively. The District Judge of Allahabad, who tried the suit, dismissed the claim to enforce the lien on mauza Asravi, on the ground that the plaintiff had elected to proceed in the Revenue

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Court, and had obtained a money-decree therein, and he was not entitled to enforce his remedy against the purchasers under the decree obtained by the second mortgagees, defendants ; and he also dismissed the claim to enforce the lien on the house at mauza Naini on the ground that the power-of-attorney given by the defendant Lalta Bibi to her husband did not authorize him to mortgage that property.

The plaintiff appealed to the High Court. The appeal came for hearing before a Division Bench composed of Stuart, C. J., and Oldfield, J., by whom the following judgments were delivered :

STUART, C. J.—Mr. Justice Oldfield has correctly stated the facts and proceedings in this case, and I quite agree with him that the decree of the Revenue Court against the surety was without jurisdiction. It is in fact absolutely null and void—mere waste paper. But I am extremely unwilling to cast the plaintiff by applying to him the principle of *res judicata*. I do not know when or in what way this plea was taken. It is not to be found in any part of the record, and I am not aware that it was taken or suggested at the hearing ; but, as Mr. Justice Oldfield has allowed it to govern his judgment on the appeal, I feel bound to consider it.

I have in several cases in this Court taken occasion to express my regret that the law on this subject as recognized by English Courts should have been so inconsiderately imported, as I conceive it has been, into the practice of the Courts of this country, where there are few, if any, of the safeguards which render this plea a reasonable one in a European Court ; and there are even judgments of the Privy Council in appeal from the High Courts of India which carry the principle of this plea so far, that I would hesitate to apply the doctrine they lay down although approved by so august a tribunal, unless the facts were precisely the same. It should be remembered that there is not here that *copia peritorum*, that resource of skilled appliance afforded by the presence of a thoroughly trained and experienced bar that there is in England (or rather I should say in Great Britain and Ireland, for the legal practice on this subject is the same in all parts of the United Kingdom), and that to introduce into the practice of the District Courts of India a legal principle which, especially as recently developed and ex-

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pounded, is the result of a high degree of legal refinement, is not considerate towards suitors who form part of such a population as we have to deal with, if it is not tantamount to a denial of justice to them. These poor people avail themselves of the best professional assistance they can get in the zila within which their villages are situate; but that is often poor indeed, if it is not generally unreliable; and to refuse relief to a plaintiff who makes an apparently just claim simply because his ignorant district pleader had omitted a particular plea in a previous suit is surely a proceeding of doubtful wisdom.

We were referred to several cases in support of this plea, three in particular: *Denobundhoo Chowdhry v. Kristomones Dossu* (1), *Baldeo Sahai v. Bateshar Singh* (2), and *Woomatura Debia v. Unnopoorna Dassees* (3). None of these cases, however, appear to me to apply to the present. But after what I have suggested on the general character of the plea, I may be allowed to say that I cannot withhold my sympathy from the views of Sir Richard Garth, the Chief Justice of the Calcutta Court, in the long and elaborate judgment he gave in the first of these cases, dissenting from the other members of the Court, and in which he refers to the inconvenience and unreasonableness of applying the principle of this plea to the litigation of the natives of this country.

The plea, however, is taken in a different manner in the present case, and what occurred was this: there had been another suit between the same parties, certain of the present defendants being therein plaintiffs, in which a decree was made in their favour. In that suit the plaintiff pleaded all his pleas, and among others the prior lien under which he now claims. He brought his position and contention fully before the Court, and yet the Subordinate Judge refused to adjudicate upon the prior lien, and referred the plaintiff to another suit for that purpose. The words of the judgment are these:—"The Maharajah may sue in a proper Court to establish his lien, and then claim the benefit as against a subsequent hypothecation. When he does so, the plaintiff, or the purchaser under his decree, will have the option of paying off the first incumbrance." And this advice the plaintiff followed, and because he did so and ac-

(1) I. L. R., 2 Calc. 152. (2) I. L. R., 1 All. 75.

(3) 11 B. L. R., 158.

quiesced in and obeyed the judgment, we are told that he is barred by the plea of *res judicata*. Now, even assuming that the Subordinate Judge was wrong, and had failed to satisfy the legal requirements of the case by his order, still the plaintiff was guilty of no neglect of his duty as a litigant in such a case, nor of anything that could reasonably be called *laches* on his part. He simply did as he was told by the judicial authority to which he owed obedience in his suit, and I trust he is not in consequence ousted of his rights by the plea in question, for a more unjust—I had almost said a more mischievous—use of this plea I cannot conceive.

But I may be permitted to doubt whether the plea of *res judicata* is relevant to the present suit as against the plaintiff, or that it in any way applies so as judicially to raise any question calling for determination respecting the Maharajah's prior lien. In the first place, Babu Lal and others, the plaintiffs in the former suit, are not defendants in the present case in that litigious character, but simply as auction-purchasers of the property which had previously been transferred in security to the Maharajah. But in the second place, even if it had been otherwise, the Maharajah's security-bond was not in any way disputed in the former suit, and therefore did not call for any adjudication in the present case on the part of the Subordinate Judge. Again, the Maharajah's title as purchaser was not only legally bad but absolutely void, and his rights under his bond could only be determined in a suit with a distinct issue on the subject between him and Lalta Bibi. But such a question was altogether beside the legal requirements of the first suit, and it was competent to the Subordinate Judge to do as he has done in the present case by restoring the Maharajah to his original place under his security, and, as a consequence, allowing him to enforce it by a separate suit. There, therefore, seems to have been no place for such a defence in the former suit.

Nor do I consider the plaintiff was bound to apply for a review of judgment, for the presumption on which he was entitled to act was in favour of the Subordinate Judge's judgment; and the plaintiff ought not to be prejudiced because he did as he was directed by it, instead of applying for a review of judgment, which would have been a proceeding under an opposite presumption altoget-

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ther—viz., a presumption that made him bound to assume that the judgment was wrong. I do not consider that he was bound so to assume, but was entitled to adopt the course recommended to him by the Court, and that he is entitled to our judgment on his lien, and, as that lien is prior to that of the defendants, I would allow the third reason of appeal, decree the plaintiff's claim for enforcement of the hypothecation in his security-bond, dated the 4th July, 1870, and reverse the decree of the Court below, with costs in both Courts

I may add that the provisions relating to the plea of *res judicata* in the new Procedure Code (Act X of 1877), and which carry the principle of the plea further than I approve in this country, do not appear to cover such a case as the present, where the Subordinate Judge does not decide on the plea one way or another, but by express order leaves it for determination in another suit; the plaintiff simply obeying the order, and the defendant recording no plea to the contrary or objection thereto.

OLDFIELD, J.—The plaintiff sues to recover a sum of money representing instalments of rent for 1279 and 1280 fasli, due by a lessee, by enforcement of an hypothecation in a registered security bond, dated 4th July, 1870, executed by defendant No. 1, in which she became surety for the lessee, and hypothecated mauza Asravi and a house in mauza Naini as security for the payment of the rent.

The plaintiff obtained two decrees in the Revenue Court against the lessee and the surety (defendant No. 1) for these instalments, and in execution of one of these decrees he caused to be sold the surety's rights and interests in mauza Asravi, and purchased them on 20th July, 1874, for Rs. 1,800, being less than the amount of the decrees. The defendants Nos. 2 to 5 held a bond, dated 30th November, 1871, from defendant No. 1, in which mauza Asravi was hypothecated to them, and they brought a suit against defendant No. 1, and this plaintiff set up his purchase and the lien under his bond, and it was held, on 28th June, 1875, that his purchase did not give him a lien since it was made under a decree of a Revenue Court, which was only a personal decree against the surety and did not declare the lien, nor had plaintiff in the Reve-

nue Court claimed to enforce the lien, and he was referred to a regular suit to establish his lien. The defendants Nos. 2 to 5 have since purchased the property at auction-sale in execution of their decree.

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Plaintiff now brings this suit, and its object is to have his lien under his security-bond enforced, and the property declared liable to sale under it for realisation of the unsatisfied balance of the instalments which were decreed to him in the Revenue Court. The lower Court has held that, as the plaintiff elected to proceed against the surety in the Revenue Court for a money-decree, he gave up his lien, which he cannot now enforce in another suit; and that the fact that the Revenue Court had no jurisdiction to give a decree against a surety does not affect the case, as he made his purchase in execution of the Revenue Court's decree with full knowledge of the lien claimed by these defendants. The Court further held that there was no valid hypothecation of the house under the bond. The plaintiff has now appealed.

There is no doubt, under rulings of this Court, that the suit in the Revenue Court against the surety for rent on the bond was not maintainable, and that the decree against the surety was made without jurisdiction. The Revenue Court, moreover, was not a Court which could have entertained a claim for enforcement of the hypothecation under the bond. These proceedings in the Revenue Court will not, therefore, operate to bar this suit. Nor is the present claim affected by the sale of the property to plaintiff under the Revenue Court's decree, for that sale was made without authority, being in execution of a decree of a Court not having jurisdiction. The sale could confer no valid title, nor invalidate any previous title by way of lien which the plaintiff may have by reason of the security-bond.

The case which has been brought to our notice (1) is not in point. In that case the Court which made the decree and ordered the sale was a Court of competent jurisdiction, although the decree was reversed by a superior Court. It appears to me, however, that this suit cannot be maintained with reference to the suit between the same parties decided on 28th June, 1875. In that

(1) *Jan Ali v. Jan Ali Chowdhry*, 1 B. L. R., A. C., 56.

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suit the defendants in this case Nos. 2 to 5 sued this plaintiff to enforce their lien under their bond dated 30th November, 1871, and they obtained a decree in their favour, and have had the property sold in execution of their decree, and have bought it. This plaintiff was bound in that suit to set up all his defences, and he should have set up the prior lien he now claims under his bond against the enforcement of the defendant's bond by sale of the property. Indeed, he appears to have done so, and the question of the validity of the prior charge he claims should have been determined, and he should not have been referred to a separate suit as appears to have been the case. This plea, to the best of my recollection, was raised at the hearing before us, and appears to me to fall within the scope of the 2nd and 8th objections taken by the defendants Nos. 2 to 5 in their written statement of 4th July, 1876. He may possibly have a remedy by review of judgment, but not by a separate suit. I concur with the Judge in considering that the power-of-attorney dated 19th July, 1870, executed by defendant respondent Lalta Bibi in favour of Mahesh Parshad, did not empower him to hypothecate the house which is the other property sued for. I would dismiss the appeal with costs.

The defendants appealed from the judgment of Stuart, C. J. to the Full Bench, under cl. 10 of the Letters Patent.

Pandit *Bishambhar Nath* and *Munshi Ram Prasad*, for the appellants.

*Munshi Hanuman Prasad* and *Babu Sital Prasad*, for the respondent.

The following judgments were delivered by the Full Bench:

TURNER, O. C. J.—(After stating the facts continued):—In appeal to the Full Court several pleas are urged. It is contended that the Maharajah's right to insist on his incumbrance on *Asrari* was put in issue in the suit brought by the second mortgagees and determined against him and that it cannot now be enforced. This objection proceeds on a misapprehension of the judgment pronounced in that suit. It was not there held that the Maharajah had not the right to enforce his lien, but that he could not enforce it until by bringing a suit he had obtained an order for sale, and

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that the second mortgagees were entitled to an order for sale subject to the first incumbrance, which a purchaser under the decree would be at liberty to discharge. The right which the Maharajah now asserts was not disaffirmed by the Subordinate Judge but declared, and a first mortgagee cannot resist the claim of a second mortgagee to bring the mortgaged property to sale subject to the first mortgage. The decree of 1875 does not therefore preclude the Maharajah from claiming to enforce his incumbrance on mauza Asravi. Nor is the claim affected by the circumstance that the Maharajah brought to sale in execution of the decree of the Revenue Court the rights and interests of Musammat Lalta Bibi in Asravi. All that was then sold was the equity of redemption, which was sold to satisfy the money-decree held by the Maharajah. No doubt the proceeds of the sale would after satisfaction of the costs of the decree go *pro tanto* for the satisfaction of the sums secured by the first incumbrance, but the Maharajah by selling in execution the mortgagor's equity of redemption did not forego his incumbrance.

It must be admitted that some issues were left undetermined by the judgment of His Honor the Chief Justice. It is clear that the power-of-attorney did not warrant the hypothecation of the house in Naini and the claim to bring to sale this property must be dismissed. The decree then must in any case be limited to the sale of mauza Asravi. An oral objection was taken to this part of the claim that there was no consideration for the execution of the surety-bond, seeing that the bond was executed on the 4th July, 1870, whereas the lease had been executed on the 11th May, 1870. But the circumstance that the two documents were not executed on the same date does not necessitate the conclusion that the execution of the one was not the consideration for the execution of the other. It is not always convenient for the several parties to assemble at one place and at one time. We see no reason to doubt that the lease would not have been executed except on the understanding that the surety-bond was in fact given in consideration of the execution of the lease. It was a part of the original contract for the lease that a surety should be procured and the Musammat consented to be the surety. It remains to be determined for what sums the incumbrance may be enforced. It is contended



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that the costs incurred in the Revenue Courts cannot be recovered. This plea must be allowed, for there is no stipulation in the bond to provide for the payment of such costs. It is again contended that the Maharajah cannot claim to recover in this suit interest on the arrears decreed by the Revenue Court, but the bond does provide for the payment of interest and therefore this plea must be disallowed. Lastly, it is contended that the claim for the arrears decreed on the 24th September, 1872, should be reduced by the amount recovered by the sale of the equity of redemption. On the part of the Maharajah this claim is resisted on the ground that the decree obtained by him in the Revenue Court was a nullity, inasmuch as that Court had no jurisdiction to entertain a suit against the surety. At the time the suit was brought it had not been ruled that the Revenue Court could not entertain such suits. It may, however, be assumed that, had the surety appealed, the decree obtained against her in the Revenue Court would have been set aside. It may also be allowed that a sale under a decree which on the face of it has been passed without jurisdiction is voidable. Whether a sale would be set aside at the instance of the person who had procured it is open to question, but in fact the Maharajah did not disavow the sale nor were any proceedings taken to set it aside. The Maharajah took possession and realised profits until he was ousted by the purchasers under the second mortgage. The sum realised by the sale must then be applied, firstly, to the satisfaction of the costs incurred in the suit in the Revenue Court, and the balance will go in reduction of the arrear sued for in that suit, or the balance of that arrear, and for the arrear sued for in the second suit with interest at the rate agreed from the date of the accruing of the arrears respectively until realisation. The Maharajah is entitled to an order for the sale of Asravi unless in the meantime the second mortgagees bring into Court the amount found due together with the balance of costs which may be due to the Maharajah in the present proceedings. The residue of the claim should be dismissed. Each party will pay and receive costs in all Courts in proportion to the amount of the claim decreed and dismissed: the costs of the second mortgagees being estimated in respect of the claim to bring to sale Asravi and the costs of the Musammat being calculated on the value of the house in Naini. The decree of the Division Bench will be modified accordingly.

PEARSON, J.—Concurred.

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OLDFIELD, J.—Having reheard the arguments in this case, I modify the opinion expressed in my former judgment, and concur in the order proposed by my colleagues.

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## PRIVY COUNCIL.

P. C.\*  
1879  
November 27.

BADRI PRASAD (PLAINTIFF) v. MURLIDHAR AND OTHERS (DEFENDANTS.)

[On appeal from the High Court for the North-Western Provinces at Allahabad.]

*Usury laws under Regulation XXXIV of 1803—Obligation on mortgagee to file accounts.*

In a mortgage dated in 1852 of *malikana* fixed for the period of settlement, it was agreed that the mortgagee should collect the village *jama*, pay the Government demand, and take the *malikana*, of which part was to be received by him as interest on the money lent at one per cent. per *mansem*, and the balance, *viz.*, Rs. 565 per annum, was to be retained by him as the costs of collection. No accounts were to be rendered of the *malikana* collected during the time of the mortgagee's possession.

If this agreement had been a contrivance for securing to the mortgagee a higher rate of interest than that to which he was then by law entitled, it would have been void under the usury laws (in force under Regulation XXXIV of 1803 until the passing of Act XXVIII of 1855), and would not have prevented the accounts from being taken.

But as the Courts found that the Rs. 565 per annum constituted a fair percentage, which it had been *bond fide* agreed should be allowed to the mortgagee for the costs of collection, it was held that the agreement had been rightly treated as a sufficient answer to a suit based on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied if the accounts (contrary to the agreement) were taken on the basis of charging the mortgagee with the Rs. 565, or so much thereof as he should fail to prove had been actually expended in the collection.

If the amount received by the mortgagee had been fluctuating, production of the accounts might have been necessary for a decision on the validity of the agreement set up. But it could not be said that by no agreement could a mortgagee relieve himself from the obligation of filing accounts under the 9th and 10th sections of Regulation XXXIV of 1803: and in this case he had done so: the only sum that he was to receive beyond the interest allowed by law being an unvarying balance found to be a fair allowance for the costs of collection.

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\*Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

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Appeal from a decree of the High Court for the North-Western Provinces at Allahabad, dated the 25th November, 1876, affirming a decree of the Subordinate Judge of Aligarh, dated the 18th September, 1875.

This suit was for the redemption of a mortgage of *malikana* received from five villages in a taluqa called Guhrari, in the Aligarh district. The total rent payable to the *mukaddam biswadaran* of these villages, under the settlement of 1836, was Rs. 9,870, of which they had to pay Government revenue to the amount of Rs. 7,649, retaining the difference, Rs. 2,221, as their *malikana*. On the 16th Jannary, 1852, they mortgaged this *malikana* to a Gokal Das, agreeing to place him in the same position as they were themselves as regards the right to collect the whole *jama* from the *malguzars*. That part of the instrument of mortgage which was material to the question in this suit is set forth in the judgment on this appeal. In August, 1864, the son of Gokal Das sold the interest of the mortgagee, which had descended to him, to the respondents; and in 1874 and 1875 this appellant purchased from the mortgagors, or their successors, their interest in the mortgaged *malikana*. In June, 1875, the plaintiff sued for redemption, attempting to show that, allowing the actual cost of collection from May next after the execution of the mortgage, when the first collections were made, with interest at the rate of 12 per cent. per annum, the whole debt, principal and interest, would have been paid off in 1863-64. For the defence it was insisted that the plaintiff was bound by the stipulations of the mortgage. On an issue as to whether the sum of Rs. 565 was a fair allowance for the costs of collection, the Subordinate Judge found that it was so; and that "the biswadars from whom the mortgagee *lambardar* had to collect rents are numerous in each village: in mauza Rothipura the biswadars are 90 and in Harduari 200, and the mortgagee has to collect very small items from them". He concluded that the plaintiff was not entitled to any reduction of the mortgage-money, as the contract had been *bond fide* made, and dismissed the suit. The High Court, on an appeal urging that the Rs. 565 must be regarded as a usurious addition to the legal interest, declared as follows:—

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"We are of opinion, however, that the above stipulation in the mortgage is not in the nature of a contract for interest. When the parties agreed that Rs. 565 should be allowed for expenses without an account, there was no evasion thereby of the law, or any contract to give usurious interest. This item was *bond fide* for the cost and risk of collections. It is an item in the accounts based on the footing of a distinct contract quite apart from the question of interest, and when we look at the position of the mortgagees, there was nothing unusual or unfair about it. They had to collect Rs. 9,870 from the biswadars, and were responsible for the payment of the revenue, and they had moreover to see that the biswadars made the collections from the tenants. Their position was certainly one of some risk, and the percentage allowed to them for the expense and risk of collecting was certainly not exorbitant or unusual. It may or may not be that their actual expenses fell short of the sum allowed, but this consideration will not render the arrangement a contravention of Regulation XXXIV of 1803, and therefore one to be set aside. The view here taken is, we find, supported by decisions of the Courts, cited by Mr. Macpherson in the 5th edition of his work on Mortgages, pages 51 and 53. We affirm the decision of the lower Court and dismiss the appeal with costs."

On appeal against this decision,

Mr. *Doyne* appeared for the appellant.

Mr. *Leith*, Q. C., and Mr. *Ernest E. Wilt*, for the respondents.

Mr. *Doyne* for the appellant contended that the respondents as mortgagees were bound by law to produce accounts, and that without the production and verification of the accounts no satisfactory conclusion could be arrived at on the question whether the allowance of Rs. 565 was a reasonable stipulation, or an evasion of the laws against usury.

The respondents were not called upon.

Their Lordships' judgment was delivered by

SIR J. W. COLVILLE.—This is a suit brought by the purchaser and assignee of a mortgagor's interest against the purchasers and

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assignees of the mortgagee's interest. The mortgage-deed between the original parties was dated 16th January, 1852. It was a mortgage of what was called the *malikana* interest of certain taluqdars; the amount of that *malikana* being, during the pendency of the then settlement, a fixed and known sum. The mortgage-deed contained this stipulation: "We hereby make a written agreement that the said mortgagee having taken possession of the mortgaged villages, with all the powers enjoyed by us, may on his own authority collect the *jama* fixed by the Government from the villages of the *iluga*, and himself pay the revenue to the Government, instalment after instalment, according to the usage in the pargana; that he may bring to his own use the income of the *malikana* due to us, crediting every harvest Rs. 1,656 per year as interest on the amount of consideration on this mortgage, at the rate of one per cent. per mensem, and take the remainder, Rs. 565, the surplus of the *malikana*, as his own collection fee and pay of the agent and peons employed for making collections in the villages; that is, he may credit the income of the *malikana* to the payment of two items—one, the interest on the mortgage-amount, and the other the expenses incurred in making collections in the villages; for we have agreed that the amount of interest of the mortgage consideration, and the expenses of making collections in the villages, should be equal to (or cover) the *malikana* profits, and we have no longer any right to claim a rendition of the account of mesne profits accruing during the time of the mortgagee's possession."

The principal question raised by the present appeal, and argued by Mr. Doyne at the bar, is whether this agreement is sufficient to deprive the plaintiff of his statutory right, under the 9th and 10th sections of Regulation XXXIV of 1803, to call upon the defendants to render the account mentioned in those two sections. A preliminary question however arises as the legal validity of the agreement. There can be no doubt that such a contract would previous to that Regulation have been a good and legal contract, and that it would, under the law as it now exists since the repeal of the usury laws, be also a good and legal contract, it being an old and well-known customary form of mortgage that the mortgagee should take the mesne profits in lieu of interest, and so be saved from

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having to account for them. But there can be, on the other hand, no doubt that at the time when this mortgage was made the law by which the contract was governed was otherwise; that the Regulation had limited the rate of interest to twelve per cent., and contained provisions under which securities might be avoided if they contracted directly or indirectly for a higher rate of interest; and that the taking of the accounts between mortgagor and mortgagee was regulated by the 9th and 10th sections. Therefore if the stipulation in question had been made in evasion of the usury law introduced by the Regulation, and as a contrivance for giving the mortgagees a higher rate of interest than that to which they were by law entitled, it would have been a bad contract, and could not have prevented the accounts from being taken in the usual manner. In the present case, however, both the Indian Courts have found in favour of the legal validity of the stipulation as will presently be more fully stated. It has however been contended that, however this may be, a mortgagee cannot by contract relieve himself from the statutory obligation of filing accounts under the 9th and 10th sections; and this is the principal, if not only, point raised by the appellant.

Their Lordships are of opinion that this contention is not well-founded. There is nothing in the Regulation which says expressly that the accounts must be filed whether they are required for the determination of the rights of the parties in the suit or not. On the other hand the 15th section says:—"Nothing in this Regulation being intended to alter the terms of contract settled between the parties in the transactions to which it refers (illegal interest excepted), the several provisions in it are to be construed accordingly; and any question of right between the parties is to be regularly brought before and determined by the Courts of Civil Justice." It is under this enactment that the Courts below have tried and determined the validity of the stipulation in question. They have found that it is not in the nature of a contract for interest; that there was no evasion thereby of the law, or any contract to give usurious interest; that the Rs. 565 constituted a percentage which was *bond fide* agreed to be allowed to the mortgagees for the expense and risk of collecting; and which, being only about 5½ per cent., was certainly neither exorbitant nor unusual. Having so

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found, they were bound to give effect to their decision, by treating the agreement as an answer to the suit, which proceeded on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied, if the accounts were taken, contrary to the legal contract of the parties, on the basis of charging the mortgagees annually with the Rs. 565, or so much thereof as they should fail to prove had been actually expended by them in respect of the costs of collection.

Their Lordships must by no means be taken to decide that if the amounts received by the mortgagees had been fluctuating they might not have been bound to file the statutory accounts. Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up. In the present case, however, it is clear that the only sum which the mortgagees could receive, *ultra* the interest, was a fixed and unvarying balance of Rs. 565, and this the Courts have found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection. If this be so, the only result of compelling the defendants to file accounts would be to increase the costs of suit which must ultimately fall on the plaintiff.

Their Lordships therefore see no reason for questioning the correctness of the decision to which both the Indian Courts have come, and they must humbly advise Her Majesty to confirm the decree of the High Court, and to dismiss this appeal with costs.

Agent for the appellant: Mr. T. L. Wilson.

Agent for the respondent: Messrs. Pritchard and Sons.

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January 2.

## APPELLATE CIVIL.

*Before Mr. Justice Spankie and Mr. Justice Straight.*

COHEN (DEFENDANT) v. THE BANK OF BENGAL (PLAINTIFF).\*

*Bill of Exchange—Exclusion of Evidence of Oral Agreement—Act I of 1872  
(Evidence Act), s. 92.*

It was agreed between the Bank of Bengal at Calcutta and C and Co., who carried on business there, that the Branch of the Bank at Cawnpore should discount

\* Second Appeal, No. 318 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 13th November, 1878, modifying a decree of Babu Ram Kali Claudhri, Subordinate Judge of Cawnpore, dated the 25th September, 1878.

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bills to a certain extent drawn by C, who carried on business at Cawnpore, on C and Co. against goods to be consigned by rail to C and Co., and that the railway receipts for such consignments should be forwarded to C and Co. through the Cawnpore Branch of the Bank. C accordingly drew a bill on C and Co., payable twenty-one days after date, which the Cawnpore Branch of the Bank discounted, receiving the railway receipt for certain goods consigned to C and Co. C and Co. having accepted this bill, the Bank handed over the railway receipt to them. In a suit by the Bank against C, on the bill, the latter set up as a defence that the bill had been discounted by the Bank on the oral understanding that the railway receipt was not to be transferred to C and Co. until they had paid the amount of the bill, and that the Bank had, by the breach of this condition, determined the defendant's liability. *Held* by STRAIGHT, J. (SPANKIE, J., dissenting) that evidence of such oral understanding was not admissible even under proviso 3 of s. 92 of Act I of 1872.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

Messrs. *Conlan* and *Colvin*, for the appellant.

Messrs. *Hill* and *Howard*, for the respondent.

The following judgments were delivered by the Court :

SPANKIE, J.—The liability of appellant under ordinary circumstances is not denied, and it may be said that his entire case stands or falls with the allegation, that the railway receipt which accompanied the bill was not to be parted with to Cohen Brothers until they had paid the amount of the bill, and it is urged that the Bank did part with the receipt before the bill had been discharged, and therefore the appellant was no longer liable. It is admitted by appellant in his third plea that the determination of this point was the true issue in the suit.

I did not understand that it was seriously contended that appellant was not at liberty to offer evidence of the agreement or understanding set up by him. But I am disposed to hold that the oral agreement set up is not one that contradicts, varies, adds to, or subtracts from, the terms of the contract, and that both provisos 2 and 3 of s. 92 of the Evidence Act might apply to his case.

I do not, however, think that it is necessary to consider this point at any length, because it appears to me that both the lower Courts have disposed of the averment, which raises a question of fact. Was or was there not any such oral agreement? The first Court found



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that the railway receipt was taken from appellant for the satisfaction of Cohen Brothers, on whose letter of credit the amount of the bill was advanced to appellant, and for no other reason. The lower appellate Court must be regarded as having the issue before it in the words of the second plea in the memorandum of appeal below, "that the conduct of the plaintiffs debarred them from recovering in the suit against defendant." The Judge sets out in his judgment the contention of defendant that plaintiffs had failed to recover the value of the bill, and made over the railway receipt to Cohen Brothers without realising upon their acceptance, and therefore he was not liable. The lower appellate Court refers to the finding of the first Court, that it was at the request of Cohen Brothers, and for their satisfaction, that the railway receipt was taken by the plaintiff and forwarded with the bill of exchange for acceptance. The Judge then observes, that on a full consideration of the facts elicited he sees no cause to distrust the finding, and that he agrees with the lower Court as to the facts. The finding seems to me to dispose of the plea as to any separate oral understanding between the parties that the railway receipt was not to be given up until the amount of the bill had been paid.

The appeal having come as a second appeal, we cannot interfere with the finding of fact on the point, and so the legal admissibility of the evidence to prove the understanding does not arise so far as the appellant is concerned, for he relies upon it. I would therefore dismiss the appeal and affirm the judgment with costs.

STRAIGHT, J.—This was a suit brought to recover the sum of Rs. 2,500, with a further amount for interest and protesting charges, due upon a bill of exchange, dated 2nd August, 1878, drawn by the defendant, appellant, upon and accepted by Cohen Brothers and Co. of Calcutta, in favour of the respondent Bank, and payable twenty-one days after date. The defendant pleaded in substance, that the bill was not discounted by the Bank upon any security of his, but upon the strength of a letter of Cohen Brothers and Co., and a certain railway receipt for goods, which two documents will be more particularly adverted to presently. He also alleged an understanding between himself and the Bank, that the railway receipt was not to be parted with to Cohen Brothers and Co., until they had paid the

amount of the bill to the Bank. The defendant further pleaded, that as the Bank had already brought a suit against Cohen Brothers and Co. and obtained a decree, there should be no second suit against him for the amount of the bill. Both the lower Courts found in favour of the plaintiff Bank, and decreed the claim. The defendant now appeals and his pleas raise the same questions as those already detailed.

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The facts of the case would appear to be as follows :—The defendant, Mr. A. M. Cohen, resides and carries on business at Cawnpore. The Bank of Bengal, whose head offices are in Calcutta, has a branch at Cawnpore under the management of a Mr. Sterndale. On the 13th June, 1878, the following letter was received from the firm of Cohen Brothers and Co., then carrying on business in Calcutta, by the secretary and treasurer of the Bank of Bengal :—

“Dear Sir: We request the favour of your instructing your Cawnpore agency to take Mr. A. M. Cohen’s drafts on us, to the extent of Rs. 5,000, from time to time as may be required, which we undertake to honor and pay till we countermand this. Mr. A. M. Cohen is an old resident of Cawnpore and no doubt well-known there. The drawings will be against hides and other produce to our consignment. As requested, we will advise him when sending railway receipts to us to do so through your Bank.”

The authorities at the head-office of the Bank appear to have acceded to this arrangement, and instructions were given to the Cawnpore branch to honor the drafts of Mr. A. M. Cohen on Cohen Brothers and Co. On the 2nd August, 1878, the bill for Rs. 2,500, on which the suit is based, was drawn by Mr. Cohen, and discounted by the Bank at Cawnpore, and was handed over with a railway receipt for goods, valued at Rs. 2,800, for transmission to Calcutta, and acceptance there by Cohen Brothers and Co. In due course, namely, on the 5th August, the bill was accepted by them, and thereupon the railway receipt was handed over to them, and in ordinary course, no doubt, the goods were obtained and disposed of in the ordinary way of their business. Before the twenty-one days of the bill had run Cohen Brothers and Co. would seem to have got into financial difficulties, and when it matured and was presented for payment, they were unable to meet it. A suit was consequently

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brought against them in the Calcutta High Court upon the bill and judgment was recovered, but no satisfaction by execution or otherwise was obtained. Consequently the present suit was brought against the defendant, as drawer, and he being resident at Cawnpore, it was instituted in the Court of the Subordinate Judge there.

It has been argued on the part of the defendant, appellant, that the bill was in reality discounted on the faith of Cohen Brothers and Co's. letter of June 13th, already set out; that it was only handed over to the Bank on the distinct undertaking that the railway receipt, which accompanied it, was not to be parted with to Cohen Brothers and Co., until they had paid the amount of the bill, and that the Bank by committing a breach of this condition had determined the liability of the defendant.

It is impossible to accept this contention. It is more than doubtful whether any such defence as that which has been set up is properly admissible, even under cl. 3, s. 92 of the Evidence Act. The whole argument for the defendant has proceeded upon a somewhat loose view of the law relating to contracts, as far as it affects negotiable instruments, and the relative position of drawer, payee, and acceptor of a bill of exchange seem to have been entirely lost sight of. S. 92 of the Evidence Act was no doubt framed in accordance with the current of English decisions upon the question of how far parol evidence can be admitted to affect a written contract, and this Court must take care, in placing a construction upon it, not to create a precedent, that would open the door to indiscriminate parol proof of transactions, where written documents have recorded what has passed between the parties. It is perfectly intelligible why there are authorities which go to show, that a defence may be set up to an action on a bill of exchange to the effect, that there was no consideration for it, but it is equally plain, that a defendant may not allege an oral agreement, that contradicts or operates in defeasance of a clear contract, which appears upon the face of a written instrument. The law upon this point may be found fully discussed in *Alrey v. Cruz* (1), the circumstances of which case are not altogether unlike those involved in the present suit. If the contention of the defendant is correct, that he drew

(1) L. R., 5 C. P., 37.

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the bill and handed it to the Bank on the understanding that the railway receipt was not to be given up to Cohen Brothers and Co. till they had paid the Rs. 2,500, his position as drawer would have involved no liability, and the instrument itself would in reality not be what it purports. What necessity was there, under such circumstances, to make it run twenty-one days, when it was intended practically to be a draft payable on demand, and how could the acceptors, who were ignorant of any such arrangement, be bound by it? Had the Bank refused to deliver the railway receipt to Cohen Brothers and Co., when they had accepted the bill on the 5th August, and damage or loss had been sustained by such refusal, it is difficult to see what defence there would have been to an action at their instance. The defendant was the consignor of the hides, the firm of Cohen Brothers and Co. the consignees, and any conditions or terms, such as those set up by the defendant, as having been agreed to between himself and the Bank, cannot in an action on a bill of which the consignees, who knew nothing of any such conditions or terms, were the acceptors, be prayed in aid by him to escape his liability. If the defence is worth anything it must be taken to its fullest extent, the effect of which must be to render the bill of August 2nd absolutely inoperative, except against an acceptor, who is in entire innocence of the circumstances under, and the condition upon which, it was drawn. This position is irreconcilable not only in law, but according to all commercial practice and custom. The Bank of Bengal would, indeed, be carrying on a strange business, if, at the ordinary rate of discount, it made advances and acted as an intermediary in the fashion suggested by the defendant. This version of the transaction is altogether at variance with common knowledge and ordinary mercantile procedure, while the position taken up by the Bank is in accordance with all well-understood and commonly practised mercantile custom. It is perfectly obvious, that at the time the letter of June 13th was written the Bank authorities had requested, as an earnest of the *bona fides* of the transactions, that in discounting the bills of A. M. Cohen the railway receipts should pass through their hands, and to suggest that they even intended to be or ever were bailees for A. M. Cohen is absurd. In the most usual and well understood fashion he, as consignor, was drawing on his consignees against his consignment,

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and was obtaining discount to very nearly the full value of the goods. What profit, proportionate to the risk, the Bank was to make, if it was merely acting as agent for the defendant, in the manner suggested by him, it is not very easy to see. Nor is it at all comprehensible, why Cohen Brothers and Co. were to go through the form of accepting a bill, if the goods in respect of which their acceptance was to be given were only to come into their hands upon payment of cash. The whole case set up by the defendant appears to be untenable and impossible, and I am of opinion that each and all of his pleas fail. Although I differ with Mr. Justice Spankie, as to the admissibility of the defence set up to this claim in point of law, this will in no way interfere with or prevent our decision of this case. The lower Courts have effectually and fully disposed of the questions of fact raised in issue upon all the pleas put forward, and with their findings we cannot interfere, though I may say I entirely agree with them. The appeal must be dismissed with costs.

*Appeal dismissed.*

### FULL BENCH.

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January 3.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

**BANS BAHADUR SINGH AND OTHERS (OBJECTORS) v. MUGHLA BEGAM AND OTHERS (DECREE-HOLDERS).\***

**CHUNNI BAI (OBJECTOR) v. NAROTAM DAS (DECREE-HOLDER).†**

*Appeal to Her Majesty in Council—Security for the costs of the respondent—Execution of decree against surety—Act X of 1877 (Civil Procedure Code), ss 253, 610.*

An appeal was preferred to Her Majesty in Council from a final decree passed on appeal by the High Court, and *B* and certain other persons on behalf of the appellant gave security for the costs of the respondent. Her Majesty in Council dismissed the appeal, and ordered the appellant to pay the costs of the respondent. The respondent applied to the Court of first instance for the execution of that order against *B* and the other persons as sureties. *Held* by STUART, C. J., PEARSON, J., and OLDFIELD, J., that, under ss. 610 and 253 of Act X of 1877, such order could be executed against the sureties.

*Per SPANKIE, J., and STRAIGHT, J.—Contra.*

\* First Appeal, No. 38 of 1879, from an order of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 14th January, 1879.

† First Appeal, No. 65 of 1879, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 29th March, 1879.

Nur-ul-lah Khan obtained a decree for money against Mughla Begam and certain other persons on the 9th April, 1872, which was reversed by the High Court on the 17th March, 1873. Nur-ul-lah Khan desiring to appeal from the decree of the High Court to the Privy Council, the High Court called upon him to furnish security for the costs of the respondent. Accordingly he filed a security-bond, dated the 8th July, 1873, in which Bans Bahadur Singh and certain other persons jointly hypothecated certain immoveable property as security for such costs. On the 22nd February, 1878, the Privy Council dismissed Nur-ul-lah Khan's appeal, directing him to pay the costs of the respondent. On the 18th July, 1878, the decree-holder applied for execution of this order against the judgment-debtor and the sureties, seeking to recover the costs incurred by him in the Privy Council by the attachment and sale of the property hypothecated by the sureties as security for such costs. The sureties objected, contending that the order of the Privy Council could not be executed against them. This objection was disallowed by the Court of first instance. The objectors appealed to the High Court.

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The Court (OLDFIELD, J. and STRAIGHT, J.) referred to the Full Bench the following question :—"Whether the decree-holders can recover the costs of the appeal to the Privy Council, which have been decreed to them, by executing their decree against the sureties, who, before the passing of the decree of the Privy Council, have become liable as sureties for the payment of such costs". A similar question was raised in another case which subsequently came before Spankie, J. and Straight, J. who ordered that it should also be laid before the Full Bench, and the two cases were heard and disposed of together by the Full Bench.

The *Senior Government Pleader* (Lala Juala Prasad), for the appellants,

Lala Lalta Prasad and Munshi Mehdi Hasan, for the respondents, in No. 38.

Mr. Conlan and the *Junior Government Pleader* (Babu Dwarika Nath Banarji), for appellant.

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Munshis *Hanuman Prasad* and *Kashi Prasad*, for the respondent, in No. 65.

The following judgments were delivered by the Full Bench :

STUART, C. J.—In my opinion our answers to these two references ought to be in the affirmative. I have looked into the records for the terms of the surety-bonds in both cases, and I find that in one the bond absolutely secures the costs of the Privy Council to the extent of Rs. 4,000, and in the other case the surety bond is not limited to the costs of the Privy Council appeal, but covers the whole decree appealed against, including the decretal amount of Rs. 11,853-7-10 and the costs. The legal question, however, is the same in both references, and must be answered in the same way.

The sections of the Code of Procedure to be considered are ss. 610 and 253. S. 610 provides that :—"Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same ; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees." It will be observed that the words here employed are large and general, ordering execution of decrees of the Privy Council according to the rules, that is, *all* the rules, applicable to the execution of original decrees, and there is no exception from them of sureties or of s. 253, or of any other sections or provisions in the entire chapter. Now these rules for the execution of original decrees are comprised in Chapter XIX of Act X of 1877, and they begin with s. 223 and end with s. 343. By s. 253, which thus forms part of the rules applicable to the execution of original decrees, it is provided that : "Whenever a

person has, before the passing of a decree in any original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant." To my mind the plain effect of this provision, which is thus made part of the law provided by s. 610, is that sureties for the execution of decrees of the Privy Council are placed in precisely the same position, and have precisely the same liability, as sureties for the performance of decrees in original suits, and may be proceeded against in the same summary manner, for under s. 253 sureties have no litigious and contentious rights, but simply become liable for whatever may be decreed against their principals. There appears to me to be no difficulty whatever in applying this section to the execution of Privy Council decrees, and the effect of it when read with s. 610 is that the words in s. 253, "before the passing of a decree in an original suit," mean, under s. 610, "before the passing of a decree in an appeal to the Privy Council."

It appears to me not unimportant to observe that s. 610 is immediately preceded by provisions dealing with the subject of security for the costs of the respondent, and for the security to be taken for the due performance of Privy Council decrees and of orders made by that supreme tribunal. Thus by s. 602 it is provided that, if the certificate for an appeal to the Privy Council be granted, the appellant shall, within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date, "give security for the costs of the respondent," and by s. 603 it is provided that, when such security has been completed, the Court may, among other things, declare the appeal admitted. S. 604 provides that, at any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon. Then s. 605 provides for other and further security being taken for the expense of translating, transcribing, printing, &c., certain portions of the record; and by s. 606, if the appellant fails to comply with the order of the Court directing such security to be found, it is provided that "the proceeding shall be stayed, and the appeal shall not proceed without an order on this behalf of Her Majesty in

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Council, and in the meantime execution of the decree appealed against shall not be stayed." This section is, as I view it, very relevant to the question before us, showing, as it evidently does, the great importance attached in the mind of the Legislature to compliance with the pecuniary and necessary conditions attached to the privilege of appeal to Her Majesty in Council, the object plainly being to prevent the time of the Privy Council being taken up with idle and frivolous appeals. S. 603 again provides for security being taken, under other and further circumstances, from the respondent or the appellant in the Privy Council; and s. 609 is so important and germane in my view to the question involved in these references that I give it at length: "If at any time during the pendency of the appeal, the security so furnished by either party appears inadequate, the Court may, on the application of the other party, require further security. In default of such further security being furnished as required by the Court, if the original security was furnished by the appellant, the Court may, on the application of the respondent, *issue execution of the decree appealed against as if the appellant had furnished no such security.* And if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay all further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit."

It is thus abundantly evident that the subject of security for costs in the Privy Council was very much and very anxiously in the mind of the Legislature when it enacted s. 610, and the conclusion appears to me irresistible that, by the use of the words "in the manner and according to the rules applicable to the execution of original decrees," the intention beyond all doubt was to import into the procedure for the execution of Privy Council decrees the provisions of s. 253; although irrespective of these sections immediately preceding s. 610 I should have held that by force of its direction the liability of sureties under s. 253 was distinctly applicable to sureties under s. 610. And indeed without such a reading s. 610 would appear to be of little use, even if the term "original suit" was meant solely to apply to the proceedings in the first Court,

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But I agree with my colleagues Mr. Justice Pearson and Mr. Justice Oldfield that the term "original suit" includes the proceedings in the Appellate Court, the suit being the same throughout, and I also agree with them that the expression "decree in the original suit" is not necessarily the same thing as a decree of the Court of first instance. Indeed, having regard to the course litigation generally takes in this country, the words "before the passing of a decree in an original suit" apply not merely to the first decree in a suit, but to a final decree in an original suit after the whole course of procedure by appeal has been exhausted, including even the decree by the Privy Council. And when to this is added the express provision of s. 610, there seems to be an end to all doubt, that the true intent and meaning of the law is to place parties who have undertaken the more limited liability of being sureties before the passing of a decree by the Privy Council, in the same position as sureties who have become liable before the passing of a decree in an original suit. To say the least the law in question is capable of such a reading, and there seems to be no intelligible reason in justice or in legal policy against its practical application.

My colleagues Mr. Justice Spankie and Mr. Justice Straight, who dissent from the majority of the Court, after noticing the course of decision under s. 204, Act VIII of 1859 (which undoubtedly supports the opinions I am now expressing), wind up their views on this part of the case with the observation that it is plain that the whole current of opinion went to regard a surety as a party to the suit, but that under existing legislation execution is limited to suretyship undertaken before the passing of a decree in an original suit. My answer to these suggestions, however, is that, so far as the execution of a decree is concerned, a surety is as much now as he was under the former law of procedure a party to the suit, although that may be in a very limited sense, for, as I have already remarked, sureties have no litigious or contentious rights of their own, but simply offer their direct liability for whatever is decreed against their principals. My honorable colleagues further, with reference to the argument as to the expediency of sureties being in every stage liable, and the anomaly of refusing to extend the operation of s. 253, suggest that these are matters of which upon a simple question of construction

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no notice can be taken. But with the greatest deference to them the argument *ab inconvenienti* is of the greatest importance and ought not to be disregarded, and its force, added to the other considerations I and my colleagues who agree with me have urged, reasonably if not irresistibly, lead to the conclusion at which we have arrived.

Concurring therefore with Mr. Justice Pearson and Mr. Justice Oldfield my answer to these references is in the affirmative in both cases.

OLDFIELD, J.—It appears that in these cases, appeals having been preferred to Her Majesty in Council from decrees of this Court, the appellants before us became sureties for the costs of the respondents, and the appeals having been dismissed with costs, the question arises whether the respondents can recover their costs by proceeding to execute their decrees against the sureties or should proceed against them by regular suits. S. 610, Act X of 1877, provides the procedure for enforcing orders of Her Majesty in Council; it runs as follows: "Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees." We have therefore to ascertain the manner and rules applicable for the execution of original decrees, and we find these in Chapter XIX, treating "of the execution of decrees," under the heading *E*, "Of the mode of executing decrees," and among them in s. 253 is the following rule, "Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner

as a decree may be executed against a defendant. Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety."

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We have here clearly a rule and manner laid down for enforcing a decree of an original Court against a person who has, before passing of the decree in the original suit, become liable for the performance of the same or any part thereof, and we must apply the above rule and manner to the enforcement of the order or decree of Her Majesty in Council in the case of a person who has, before the passing of the decree of Her Majesty in Council, become surety for its performance. By the terms of s. 610 the rules applicable to the enforcement of original decrees are made applicable to the enforcement of the orders and decrees of Her Majesty in Council, and amongst them clearly those which apply to sureties for costs of a decree. This was undoubtedly the course laid down in s. 204, Act VIII of 1859, and has been followed by this and other Courts. The only material difference between the terms of s. 204, Act VIII of 1859, and s. 253, Act X of 1877, is that the terms of the former section are, " whenever a person has become liable as security for the performance of a decree," whereas in the latter they are, " whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same," the material addition being the words " in an original suit," and these words were probably added to show (possibly with reference to certain decisions under Act VIII of 1859, s. 204,—*Ram Kishen Doss v. Hurkhoo Singh* (1), *Gujendro Narain Roy v. Hemanginee Dosssee* (2), *Chuterdharee Lall v. Rambelashee Koer* (3) ) that the provision applies only to persons who have become sureties for the performance of a decree in the course of the suit and prior to the decree, and not afterwards, and was not intended to draw any distinction between persons becoming sureties before passing of decrees of a Court of first instance, and those becoming sureties after passing of the decree of the Court of first instance and before that of the Appellate Court. The term " original suit " includes the proceedings in the Appellate Court, the suit being the same throughout, and the

(1) 7 W. R., 329. (2) 13 W. R., 35.

(3) I. L. R., 3 Calc. 318.

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term "decree in the original suit" is not the same thing as "decree of the Court of first instance." Could the term, however, be so interpreted, I should still be disposed to hold that the operation of s. 610 will be to make the provisions of s. 253, "*mutatis mutandis*," applicable to execution of decrees of Her Majesty in Council in cases of persons becoming before the decree surety for its performance. I may add that no reason has been shown why the Legislature should intend to make a difference in the manner of execution between the case of persons becoming sureties for the performance of the decree of a Court of first instance, and those becoming sureties for the performance of the decree of the Appellate Court or that of Her Majesty in Council. I would answer the question referred in the affirmative.

PEARSON, J.—For the reasons stated by my honorable colleague Mr. Justice Oldfield, I concur with him in answering in the affirmative the question referred to the Full Bench.

STRAIGHT, J. (SPANKIE, J., concurring).—The question submitted to the Full Bench in this, as well as the kindred reference in First Appeal from Order, No. 38 of 1879, is substantially identical and may, for the purposes of brevity and convenience, be discussed and disposed of in a single judgment. The main point for our consideration is, Can sureties for an appellant in an appeal to the Privy Council, which is dismissed, be directly proceeded against in the execution department in the same manner as the judgment-debtor? In order to reply to this inquiry it is necessary very closely to examine the provisions of ss. 253 and 610 of Act X of 1877. Applying the attention first of all to s. 610, that will be found to regulate the procedure to enforce orders of the Queen in Council, and the following directions are given as to the procedure to be followed by a person who wishes to carry into execution any such order. He must apply to the Court from which the appeal to the Privy Council was immediately preferred, by petition, to which should be attached a certified copy of the decree and order sought to be enforced. Then the Court is to send the order to the lower Court which passed the *first decree* in the suit, and this latter Court is specifically directed to "enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of

its original decrees." It is next necessary to see what these rules are to which reference is here made. They may be found in Chapter XIX of Act X of 1877, which is intelligibly headed "*Of the execution of decrees*" and under several heads treats of the following incidental matters :—

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- 1.—The Court by which decrees may be executed.
- 2.—Application for execution.
- 3.—Staying execution.
- 4.—Questions for Court executing decree.
- 5.—Mode of executing decrees.
- 6.—Attachment of property.
- 7.—Sale and delivery of property.
- 8.—Resistance to execution.
- 9.—Arrest and imprisonment.

Now it is argued by those, who contend for a reply in the affirmative to the question under consideration, that s. 253 of this chapter, providing as it does for the execution of a decree against a surety, supplies one of the rules "in the manner and according to which" the enforcement of orders of the Queen in Council under s. 610 is to be carried out. In other words, that the effect of the two sections, when read together, is to put surety and judgment-debtor on precisely the same footing in execution. Upon a careful examination we find it quite impossible to adopt any such view. We must take the words as they are and not wander afield to try and reconcile suggested inconsistencies in the Act, or drop out a sentence, introduced, as we will show, intentionally into a clause, for the purpose of securing uniformity. What are the terms of s. 253? "Whenever a person has, before the passing of a decree in an original suit, become liable as a surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety".

The corresponding provision of the former Civil Procedure Code, VIII of 1859, contained no such words as "before the passing of a decree in an original suit;" on the contrary the language

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of s. 204 was of the most general kind and fixed no point of time at or before which a person becoming a surety fixed his liability and rendered himself liable to all the consequences to which his principal was subject. The decisions that were quoted in the course of the argument were upon cases, that had arisen under this earlier Act and to us appear clearly distinguishable from the present. Though under s. 204, Act VIII of 1859, the Courts held, that it did not apply to parties who became sureties after a decree, they nevertheless were unanimous or nearly so in declaring, that the word decree was not confined to that made in the original suit, but that the security given might be enforced against a surety in execution of an appellate decree. In fact it is plain, that the whole current of opinion went to regard a surety as a *party to the suit*, under s. 11 of Act XXIII of 1861, the corresponding section to which of Act X of 1877 is 244.

Under existing legislation, however, execution is limited to a suretyship undertaken "before the passing of a decree in an original suit." Though s. 583 provides for the execution of appellate decrees and s. 610 of orders passed by the Queen in Council according to the rules prescribed in Chapter XIX, there is not to be found in the whole of its 120 clauses one word that authorises enforcement of execution against a surety, except when he has taken upon himself that character "before the passing of a decree in an original suit." The argument, as to the expediency of sureties being in every stage liable and the anomaly, the existence of which it is argued we are countenancing, by refusing to extend the operation of s. 253, are matters of which upon a simple question of construction we can take no notice. Still as to this latter point we can well understand why a difference may fairly be drawn between a surety who undertakes his liability before the passing of the decree in the original suit, and so to speak identifies himself with and becomes a party to it, and another who comes upon the scene at a later stage, when litigation has proceeded a considerable distance on the road either to the lower appellate Court, the High Court, or the Privy Council.

The decree in the *original suit* practically passes against the surety, and so far as he is liable under it, it is that decree, which is

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enforced against him, and not any security-bond he may have entered into subsequent to the passing of that decree. The ss. 583 and 610 do not confer any greater power on the Court that made the decree appealed, than it already possesses under Chapter XIX of the Code. If that Court extends the action of s. 253, and drags within its operation a surety who has not become liable before the passing of an original decree, it is acting "*ultra vires*" and any order passed to that effect would in our judgment be illegal and void. For it would not only be enforcing a liability undertaken after the passing of its own decree, but one created under a surety-bond, the responsibility upon which no Court had definitely determined in any decree or order.

Now it should be observed, that s. 253 has a twofold character. First, it continues in mitigated shape a personal liability to execution without process originally introduced in a novel and somewhat startling form in s. 204 of Act VIII of 1859, and next it details the machinery by which such liability is to be enforced without the ordinary intervention of a suit, in summary fashion. The only reservation made in the surety's favour is that he is to have sufficient notice. The words of s. 610, however, seem simply to provide for the enforcement of decrees or orders of the Queen in Council according to the same method as original decrees are executed by the Court passing them, but they create no liability, and establish no specific responsibility in the surety. In the argument for the respondents upon s. 253 it is ingeniously sought to mix up liability and machinery and to treat them as one and the same, but the decree is one thing, the mode of executing it another. At any rate having regard to the fact that the phrase "before the passing of the decree in the original suit" is not to be found in s. 204 of Act VIII of 1859 but appears for the first time in s. 253 of the Act now in force, we must assume that it was introduced for some good purpose, and that purpose, if words mean anything, would seem to be to limit a new and somewhat arbitrary liability, existing outside the actual parties to the suit, to those persons who from its institution had *quid* guarantors so to speak, vouched for its *bona fides* by becoming sureties before the passing of the first decree. It is the decree of the original Court determining the liability of plaintiff or defendant, as the result may



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be, that by special provision carries also with it the liability of the surety against whom it may be executed, but the decree of the appellate Court or the order of the Queen in Council is not declared to have attaching to it any such contingency, and while it is perfectly intelligible, that to put in force s. 610 the machinery of s. 253 may be used, it seems equally clear to us, that the words "before the passing of a decree in an original suit" are prohibitory to an extended application of the section for the further purpose of establishing an exceptional liability.

For the reasons and upon the grounds we have adverted to we are of opinion that the question raised in this reference must be answered in the negative.

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## APPELLATE CIVIL.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.*

NAND RAM AND OTHERS (DEFEENDANTS) v. MUHAMMAD BAKHSI  
(PLAINTIFF).\*

*Dismissal of appeal for appellant's default—Appeal—Act X of 1877 (Civil Procedure Code), ss. 556, 558, 588—Act XII of 1879, s. 90 (27).*

Where an appeal is dismissed, under s. 556 of Act X of 1877, for the appellant's default, the order dismissing it is not appealable.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Nand Lal*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

The following judgments were delivered by the High Court:

STUART, C. J.—We cannot entertain this appeal. The Judge having proceeded under s. 556 of the Civil Procedure Code, the defendants ought to have applied to the Judge of the District for the re-admission of the appeal to him under s. 558, and the only further procedure open to the defendants was by an appeal to this Court from the Judge's order under s. 588 as amended by Act XII of

\* Second Appeal, No. 511 of 1879, from a decree of S. S. Melville, Esq., Judge of Meerut, dated the 18th February, 1879, affirming a decree of Rai Lachman Singh, Assistant Collector of Bulandshahr, dated the 28th August, 1878.

1879, s. 90 (27), but not having proceeded before the Judge under s. 558, there is no appeal to us, and the order of the Judge made under s. 556 is now final.

The Judge must be assumed to have done his duty according to law and the course of his Court, and with the exception of a vague suggestion as to the defendant not having known when his appeal to the Judge was coming on for hearing, nothing is stated to us against such an assumption, which we feel assured in this case is a very just one. In any case the appeal to this Court, being wholly incompetent, must be rejected with costs.

**STRAIGHT, J.**—In this case an appeal was preferred to the Judge of Meerut from a decision of the Assistant Collector of Bulandshahr. The 26th November, 1878, was fixed for the hearing, but though the parties attended Court on that day the case was not called on. It was ultimately disposed of on the 18th February, 1879, the Judge, owing to the absence of the appellant, dismissing the appeal under s. 556 of Act X of 1877. The matter now comes to this Court in second appeal.

I am of opinion that no such appeal lies to this Court. The order made by the Judge was, as has been remarked, passed under s. 556 of the Civil Procedure Code, and the course the appellant should have pursued was to make an application under s. 558 for re-admission of his appeal within thirty days from the date of the Judge's decree. All the points now urged in his behalf would have gone far to establishing the "sufficient cause" mentioned in that section, and had the Judge improperly or unreasonably refused such an application, his order would then, under s. 588 of Act X of 1877, have been appealable. This appeal is dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Oldfield and Mr. Justice Straight.*

JUALA PRASAD (PLAINTIFF) v. KHUMAN SINGH (DEFENDANT).\*

*Bond—Interest.*

*Held*, where a bond for the payment of certain money within a certain time did not contain any agreement fixing the rate of interest to be paid after the date

\* Second Appeal, No. 692 of 1879, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 18th April, 1879, modifying a decree of Babu Sanwal Singh, Munsif of Etāwah, dated the 11th December, 1878.

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it became due, that the question as to the amount of interest to be allowed after that date should be treated as one of damages, and that, having regard to the length of time that had elapsed since the bond ran out (February, 1870,) to the date on which the suit thereon was instituted (26th November, 1878,) interest at the rate of eight annas per cent. per mensem was an equitable rate to allow after the date the bond became due.

*Held* also that but for the plaintiff's laches the rate agreed by the defendant to be paid under the bond (one rupee per cent. per mensem) was a reasonable basis on which to estimate the subsequent damages.

On the 4th February, 1866, the defendant gave the plaintiff a bond in which he promised to pay him Rs. 600, with interest at the rate of one rupee per cent. per mensem, within the period of four years, and to pay such interest annually. He further agreed that if he failed to pay such interest annually the obligee should be at liberty to recover the amount of the bond at once without waiting for the expiry of the four years, and he hypothecated certain immoveable property as collateral security for the payment of the amount of the bond. The bond did not contain any stipulation regarding the interest to be paid after the bond became due. In November, 1878, the plaintiff sued upon this bond, claiming interest from the date of the bond to the date of suit at one rupee per cent. per mensem. Both the lower Courts held that, in the absence of any stipulation regarding the interest to be paid after the bond became due, the plaintiff was entitled to such interest at a reasonable rate, in the way of damages, and having regard to the great delay in the institution of the suit, they determined that eight annas per cent. per mensem was a reasonable rate, and accordingly awarded the plaintiff interest from the date the bond became due to the date of the suit at that rate.

On appeal to the High Court the plaintiff contended that he was entitled to interest from the date the bond became due at the rate agreed to be paid before that date, viz., one rupee per cent. per mensem.

Munshi *Hanuman Prasad*, for the appellant.

Pandits *Bishambhar Nath* and *Nand Lal*, for the respondent.

The judgment of the High Court (OLDFIELD, J. and STRAIGHT, J.) was delivered by

**STRAIGHT, J.**—The question as to the amount of interest to be allowed to the plaintiff, subsequent to the expiration of the four years for which the bond was given, has been properly treated by the lower appellate Court as one of damages. Upon consideration we think that, having regard to the length of time, that has elapsed since the bond ran out, to the date on which this suit was instituted, the sum decreed by the Subordinate Judge is equitable and his decision must stand. But for the plaintiff's laches we should have thought the amount agreed by the defendant to be paid under the bond was a reasonable basis on which to estimate the subsequent damages (1). The appeal is dismissed, but each party must pay his own costs.

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*Appeal dismissed.*

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*Before Mr. Justice Oldfield and Mr. Justice Straight.*

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**SHIBBAN LAL (PLAINTIFF) v. TILOKE CHAND AND OTHERS (DEFENDANTS).\***

*Partition—Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 113, 114.*

Where, in the course of carrying out an order for a partition and of assigning the lands to each co-sharer, certain co-sharers claimed certain plots of land as belonging to them in severalty and demanded that the same should be assigned to them, and the Collector decided that some of such plots were held in severalty and one was held in common, *held* that his decision was not passed under s. 113 of Act XIX of 1873, and was therefore not appealable under s. 114 of that Act.

ONE Shibban Lal applied for the perfect partition of his share in a certain mahal. The Assistant Collector notified the application and served notices on the other co-sharers in the mahal in the manner required by s. 111 of Act XIX of 1873. None of the other co-sharers objected to the partition. On the 19th December, 1877, the Assistant Collector decided to make the partition, and on the following day the partition was sanctioned by the Collector. On the 7th June, 1878, while the partition was being completed, certain co-sharers applied to the Collector objecting to the division of certain lands, claiming them as their separate property. On the 27th September, 1878, the Collector decided that all these

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(1) See also *Baldeo Panday v. Gokal Rai*, I. L. R., 1 All. 603.

\* Second Appeal, No. 694 of 1879, from a decree of S. S. Melville, Esq., Judge of Meerut, dated the 25th February, 1879, affirming an order of C. F. Hall, Esq., Collector of Meerut, dated the 25th September, 1878.

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lands except one plot were the separate property of one of the objectors, Bhagirath by name, the plot excepted being common land. Shibban Lal appealed to the District Judge from the order of the Collector. The District Judge held that an appeal did not lie to him from that order and dismissed the appeal. Shibban Lal appealed to the High Court from the District Judge's decision contending that the Collector had determined a question of title, under s. 113 of Act XIX of 1873, and that under s. 114 of that Act his order was appealable to the District Judge.

Pandit *Nand Lal* and *Shah Asad Ali*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

The judgment of the High Court (OLDFIELD, J. and STRAIGHT, J.) was delivered by

OLDFIELD, J.—Shibban Lal made an application, under s. 108 of Act XIX of 1873, for a perfect partition of his share in Pasvara. The Assistant Collector issued the usual notification and served notices as required by law, requiring co-sharers who may object to the partition to appear before him on a specified day, and no objectors appearing he directed that the partition should be made and gave the necessary directions for carrying his order into effect. In the course of carrying out his order for a partition and of assigning the lands to each share-holder, Tiloke Chand and others claimed certain plots as belonging to them in severalty and demanded that those should be assigned to them, and the Collector decided that some of these plots belonged to one of the objectors and one was held in common. Shibban Lal appealed from this decision to the Judge, who has dismissed the appeal, holding that no appeal lay to his Court. The question in second appeal is, whether the Judge's order is correct. It appears to us to be so.

The only provision which allows appeals from decisions of a Collector in course of partition proceedings is contained in s. 111 of Act XIX of 1873, and by that section it is only orders and decisions passed by the Collector of the District or Assistant Collector under s. 113 for declaring the rights of parties which are held to be deci-

sions of a Court of Civil Judicature of first instance, and open to appeals to the District or High Court under the rules applicable to regular appeals to those Courts. Now the orders and decisions passed under s. 113 are those on any question of title or proprietary right which arises out of objections preferred by co-sharers in possession in reply to the notice served on them under s. 111, by which they are required to state their objections to the partition taking place, that is, orders and decisions on a question of title or proprietary right arising properly out of objections preferred before any order has been made for effecting a partition, and referring to general questions of right and title affecting the right of the parties to claim partition, and not to such questions as have been decided in the case before us, which relate to the ownership of particular plots of land in the mauza, and which have arisen out of objections made after a partition has been ordered, and in proceedings taken for carrying it out, and which relate to details as to the distribution of the lands which form the subject of partition. In no way can it be held that the Collector's decision was passed under s. 113 so as to give a right of appeal. We therefore affirm the order of the Judge and dismiss this appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

TEJPAL, GUARDIAN OF KUNDAN LAL, MINOR (PLAINTIFF) v. KESRI SINGH  
(DEFENDANT)\*

*Bond—Compound interest—Penalty.*

*Held* that a stipulation in a bond that the interest on the principal sum lent should be paid six-monthly, and, if not paid, should be added to the principal and bear interest at the same rate was not one of a penal nature.

THIS was a suit instituted in December, 1878, on a bond executed by the defendant in favour of the plaintiff on the 1st April, 1869. The defendant stipulated in this bond to pay Rs. 150 to the plaintiff on demand, and to pay interest on that amount every six months at the rate of Re. 1-8-0 per cent. per mensem, and in

\* Second Appeal, No. 715 of 1879, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 29th March, 1879, modifying a decree of Maulvi Matin-ud-din, Munsif of Sahaswan, dated the 10th February, 1879.

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default that the interest should be added to the principal amount and should bear interest at the same rate. The plaintiff sought to recover Rs. 798-8-3, principal and interest, by the sale of the immoveable property hypothecated in the bond. The Court of first instance gave the plaintiff a decree for the principal amount and for an equal amount of interest, or for Rs. 300, in all. On appeal the lower appellate Court gave the plaintiff a decree for the principal amount, together with interest from the date of the execution of the bond to the date of the institution of the suit at Re. 1-8-0 per cent. per mensem, but refused to allow any compound interest on the ground that the stipulation in the bond for the payment of such interest was of a penal nature, which the Court was justified in refusing to enforce.

The plaintiff appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mukarji*, for the appellant.

The respondent did not appear.

The judgment of the Court (PEARSON, J. and SPANKIE, J.) was delivered by

PEARSON, J.—A stipulation in a bond that the interest on the principal sum lent shall be paid six-monthly, and, if not paid, shall be added to the principal and bear interest at the same rate, has never been held to be one of a penal nature. We are, therefore, constrained to allow the plea in appeal and to modify the lower appellate Court's decree by decreeing the claim in full with costs in all Courts.

*Appeal allowed.*

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*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

RAM SUBHAG DAS (PLAINTIFF) v. GOBIND PRASAD AND ANOTHER  
(DEFENDANTS).\*

*Computation of period of limitation—Act XV of 1877 (Limitation Act), s. 14.*

On the 26th August, 1878, R and B joined in instituting a suit in the Court of the Subordinate Judge the period of limitation of which expired on the 21st September,

\* First Appeal, No. 80 of 1879, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 5th May, 1879.

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1878. This suit was transferred to the District Court, which, on the 16th September, 1878, returned the plaint to the plaintiffs on the ground that they should have sued separately. On the 23rd September, 1878, *R* presented a fresh plaint to the District Court, which, on the 1st October, 1878, made an order rejecting it on the ground that he should have instituted the suit in the Court of the Subordinate Judge. *R* appealed from this order to the High Court, which affirmed it on the 28th January, 1879, but observed that the plaint should be returned to *R*. On the 10th April, 1879, *R*'s plaint was returned to him, and on the same day he presented it to the Subordinate Judge. Held that, in computing the period of limitation, *R* could not claim to exclude any other period than from the 23rd September, 1878, to the 10th April, 1879, for from the 26th August, 1878, to the 16th September, 1878, he was prosecuting his suit in a Court which had jurisdiction, and the inability of that Court to entertain it did not arise from defect of jurisdiction or any cause of the like nature, but from misjoinder of plaintiffs, a defect for which he must be held responsible, and from the 16th to the 23rd September he was not prosecuting his suit in any Court, and could not claim to have that period excluded.

On the 26th August, 1878, one Bhawani Prasad and one Ram Subhag Das jointly instituted a suit against one Gobind Prasad and one Ram Das in the Court of the Subordinate Judge of Azamgarh. They stated in their plaint in this suit that the defendants had publicly assaulted them on the 21st September, 1877, thereby injuring them in reputation, mind, and body, and they claimed Rs. 5,250 as compensation for such injuries. The District Court transferred this suit to its own file for trial, and on the 16th September, 1878, at the first hearing of the case, it held that the plaintiffs were improperly joining in respect of distinct causes of action, and ordered the plaint to be returned to them for amendment within a fixed period. On the 23rd September, 1878, Bhawani Prasad and Ram Subhag Das presented separate plaints to the District Court together with their original plaint, separately claiming Rs. 2,625 from the defendants. On the 1st October the District Court admitted Bhawani Prasad's plaint, and ordered that of Ram Subhag Das to be returned to him on the ground that it should have been presented in the Court of the Subordinate Judge. Ram Subhag Das appealed to the High Court from the order of the District Court returning his plaint, and the High Court on the 28th January, 1879, disallowed the appeal as inadmissible under Act X of 1877, s. 588 (c), and observed that Ram Subhag Das might apply to the District Court for the return to him of the plaint with a view to its presentation in the proper Court. On the 8th Feb-



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ruary, 1879, Ram Subhag Das applied to the District Court for the return of the plaint, and obtained an order directing its return. On the 4th April, 1879, the High Court returned the record of Ram Subhag Das' case, which contained his plaint, to the District Court. On the 10th April, 1879, his plaint was returned to Ram Subhag Das by the District Court, and on the same day he filed it in the Court of the Subordinate Judge. The suit was transferred by the District Court to its own file, and was eventually dismissed as barred by limitation. Ram Subhag Das appealed to the High Court.

Mr. *Chatterji* and Lala *Lalta Prasad*, for the appellant.

Mr. *Spankie* and Mr. *Conlan*, for the respondents.

The judgment of the High Court (STUART, C. J. and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The question with which we have to deal in this appeal is whether the suit has been instituted within the term allowed by the Law of Limitation. The cause of action accrued to the plaintiff on the 21st September, 1877, and it appears that he and his brother jointly instituted a suit against defendants in the Court of the Subordinate Judge on the 26th August, 1878, and it was removed for disposal to the Court of the Judge, and the plaint was returned to the plaintiffs on the ground of misjoinder of plaintiffs on the 16th September, 1878. A plaint was then filed by plaintiff in the Court of the Judge on the 23rd September, 1878, and the Judge rejected it on the 1st October, 1878, on the ground that it should be filed in the Court of the Subordinate Judge, and the plaintiff was directed to file it accordingly. The plaintiff appealed to the High Court from this order, and the order was affirmed on the 28th January, 1879. On the 8th February the plaintiff applied to the Judge for a return of the plaint in order that he might file it in the proper Court, and having obtained it on the 10th April he filed it in the Court of the Subordinate Judge on that day. Now as the cause of action accrued on the 21st September, 1877, the time allowed by law for instituting the suit would expire on the 21st September, 1878, and calculating to the 10th April the suit will be six months and twenty

days after time, unless the plaintiff can show that the excess period should be excluded in computing the period of limitation under the provisions of s. 14 of the Law of Limitation. But looking to the proceedings taken it is clear that at most the only time which plaintiff might claim to exclude under the provisions of s. 14 would be from the 23rd September, 1878, to the 10th April, 1879, when he was prosecuting the suit in the Court of the Judge and in the High Court. But assuming that he could satisfy us that the whole of that period should be excluded, the present suit instituted on the 10th April, 1879, will still be beyond time. The plaintiff cannot claim to exclude from the computation any other period, for from the 26th August, 1878, to the 16th September, 1878, he was prosecuting his suit in a Court which had jurisdiction, and the inability of the Court to entertain it did not arise from defect of jurisdiction or other cause of a like nature, but from misjoinder of plaintiffs, a defect for which plaintiff must be held responsible, and from the 16th to the 23rd September he was not prosecuting his suit in any Court, and cannot claim to have that period excluded. The appeal fails, as there is no reason to interfere with the order as to costs, and we dismiss it with costs.

*Appeal dismissed.*

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, and Mr. Justice Spinkie.*

**HASAN ALI AND OTHERS (PLAINTIFFS) v. MAHRBAN (DEFENDANT).\***

*Muhammadan Law—Missing person—Act I of 1872 (Evidence Act), s. 103—Act VI of 1871 (Bengal Civil Courts Act), s. 24.*

*F*, one of the heirs to the property of his parents (the family being Muhammadans), was "missing" when they died, and subsequently when the other heirs to such property sued his daughter *M* for the possession of a portion of such property. *M* set up as a defence to the suit that her father was alive, and that during his lifetime the plaintiffs could not claim his share in such portion. *Held* by STUART, C. J., and SPINKIE, J., that the suit, being one to enforce a right of inheritance, must be governed by the Muhammadan law relating to a "missing" person. *Parmeshar Rai v. Bisheswar Singh* (1) distinguished.

\* Second Appeal, No. 179 of 1879, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 14th November, 1878, modifying a decree of Muhammad Mir Badshah, Munsif of Bulandshahr, dated the 24th December, 1877.

(1) I. L. R., 1 All. 53.

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*Held by STUART, C. J., that, according to Muhammadan law, ninety years not having elapsed from F's birth, his share could not be claimed by the plaintiffs, but must remain in abeyance until the expiry of that period, or his death was proved.*

*Held by PEARSON, J., and SPANKIE, J., that F being a "missing" person when his parents died, his daughter, according to that law, was not entitled to hold his share either as heir or trustee.*

ONE Kamar Ali died leaving two sons, Kurban Ali and Nisar Ali. Kurban Ali died leaving a son, Hasan Ali. Nisar Ali died in June, 1868, leaving his wife, Faiz-un-nisa, a son, Niaz Ali, two daughters Niaz-un-nisa and Imtiaz-un-nisa, and a grand-daughter, Mahrban, the daughter of his son Farzand, who at the time of his father's death had not been heard of by his family since 1857. On the death of Nisar Ali, his son Niaz Ali was recorded in the revenue registers as the proprietor of his landed estate. Faiz-un-nisa, Niaz-un-nisa, Imtiaz-un-nisa, Sahib-un-nisa, the wife of Farzand, and Mahrban, all resided together in a house belonging to Faiz-un-nisa, and were supported out of that estate. Faiz-un-nisa died in 1873, Farzand being still missing, and Niaz Ali died subsequently in the same or the following year. On the death of Niaz Ali, by the consent of all the parties interested, Sahib-un-nisa was recorded in the revenue registers as the proprietor of 16 bighas, 18 biswas of the land owned by Nisar Ali, and on her death her daughter, Mahrban, was recorded as the proprietor of the same. In June, 1877, Farzand being still missing, Hasan Ali and the daughters of Nisar Ali instituted the present suit in which they claimed to recover possession from Mahrban of the 16 bighas, 18 biswas of land and of the house belonging to Faiz-un-nisa. The plaintiffs alleged that, inasmuch as Niaz Ali died without leaving issue and Farzand was missing at the death of his father and his mother, the property of Nisar Ali and Faiz-un-nisa descended to them, and the defendant had no right therein. The defendant set up as a defence to the suit that Farzand was alive, and that during his lifetime the plaintiff Hasan Ali had no right in the property of Nisar Ali or Faiz-un-nisa. She admitted the right of the other plaintiffs, the daughters of Nisar Ali and Faiz-un-nisa, to a moiety of the property in suit. The Court of first instance, expressing its opinion that Farzand was in all probability dead, held that, inasmuch as he was missing at the death of his parents, he had forfeited his right to succeed to a share in their

estates, and the defendant could claim no right through him, and it gave the plaintiffs a decree. On appeal by the defendant, the lower appellate Court held, on the question whether in this case the Muhammadan law relating to a missing person should be applied, or whether it should be presumed with reference to s. 108 of Act I of 1872 that Farzand had pre-deceased his parents, that, under the provisions of s. 24 of Act VI of 1871, Muhammadan law was applicable, distinguishing the present case from the case of *Parmeshar Rai v. Bisheshar Singh* (1). Applying Muhammadan law, the Court held that, inasmuch as a period of ninety years had not elapsed from the date of Farzand's birth, it could not be presumed that he was dead, and that until that period had elapsed, or his death was proved, the daughters of Nisar Ali and Faiz-un-nisa were only entitled to a moiety of the estates of their parents, and Hasan Ali was not entitled to share in the estate of Nisar Ali.

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The plaintiffs appealed to the High Court, contending that the lower appellate Court should, with reference to s. 108, Act I of 1872, have presumed that Farzand had pre-deceased his parents, and that if this were the case the defendant could claim nothing through him.

Pandit *Nand Lal*, for the appellants.

Mir *Akbar Husain*, for the respondent.

The following judgments were delivered by the Court:

STUART, C. J.—I generally concur in the view taken in this case by the Subordinate Judge, who, however, appears to have very unnecessarily occupied himself with the consideration of the Evidence Act, and with the remarks of the select committee of the Legislative Council thereon. The suit is brought by the plaintiffs for the establishment of their rights to property on the allegation that the inheritance to them has opened by the disappearance and death, during his father's lifetime, of one Farzand Ali. With respect to this Farzand Ali the facts appear to be these:—He left his home and his family in 1857, the year of the mutiny, at which

(1) L. L. R., 1 All. 53.

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time he would appear to have been about 30 years old, and therefore, if alive when this suit was instituted, his age would then have been about 51 years. He has not since been heard of, but there is nothing on the record to prove his death. Under these circumstances the first question is what is the law to be applied to the case? The parties are Muhammadans, and the question raised in the suit being one regarding succession and inheritance, the 24th section of the Bengal Civil Courts Act VI of 1871 immediately applies, and the Muhammadan law must, in the words of s. 24, form "the rule of decision," and the Evidence Act has no application whatever. The only question therefore is, what, on the facts stated, is the Muhammadan law on the subject? This question may be answered without doubt or difficulty, and it is simply this, that for ninety years from the date of his birth the property of a missing person is kept in abeyance, the principle of Muhammadan law appearing to be that, in the absence of proof to the contrary, the missing person is presumed to be alive. This rule of the Muhammadan law appears to be the result of all that is to be found in the leading authorities on that law,—Macnaghten, Baillie, and others. Now, applying this rule of Muhammadan law so stated, it is clear that the property of Farzand Ali cannot be claimed by the plaintiffs, but must be in abeyance until the expiry of ninety years from his birth, that is, for about forty years yet to come, unless in the meantime evidence is obtained proving his death. The Subordinate Judge appears to have correctly applied this rule of Muhammadan law to the facts of the case, and I would therefore affirm his order and dismiss the present appeal with costs.

I should add that the Full Bench case of *Purmeshar Rai v. Bisheshar Singh* (1) is quite consistent with the view I have taken of the facts in the present case. There the suit was brought for the avoidance of a deed of mortgage executed to the detriment of the plaintiff's reversionary rights, and it was therefore held that the provisions of s. 108 of the Evidence Act should be applicable. I was absent from the Court when this judgment was given and I express no opinion as to whether I consider it right or wrong. But the opening sentences of the judgments of Turner, J., who was acting

(1) I. L. R., 1 All. 53.

for me, and of Pearson, J., clearly support the view I have taken in the present case. This portion of the judgment of the Full Bench is as follows :—"The plaintiffs in this suit are not claiming the estate of Janki Rai, the missing person, by right of inheritance; were they claiming it, inasmuch as Janki Rai has been missing for only eight or nine years, their claim might be inadmissible under Hindu law. But they are claiming nothing belonging to him." And the judgments of Spankie, J., and Oldfield, J., are to the same effect.

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SPANKIE, J.—This being a suit for inheritance under the Muhammadan law, that law will apply to it, in regard to the missing person, Farzand Ali. The Full Bench ruling in *Parmeshar Rai v. Bisheshar Singh* (1) of this Court is not in conflict with this opinion. The lower appellate Court therefore was not wrong in holding that the case must be governed by Muhammadan law. These remarks dispose of the first plea.

On the second plea it appears to me that the judgment of the lower appellate Court is wrong and that the Munsif was right.

According to the Muhammadan law of inheritance, a missing person is considered as living in regard to his own estate, so that no one can inherit from him, and dead in regard to the estate of another, so that he does not inherit from any one, and his estate is reserved until his death can be ascertained, or the term for a presumption of it has passed over. I find a summary of the law quoted from well-known authorities and cited in the Madras edition of Macnaghten's Muhammadan law, referred to by Babu Shama Charan Sirkar in his printed Tagore Lectures.—"Thus, if he (the missing person) had an estate when he disappeared, or if at that time he was entitled to a share in a joint property, such property cannot be inherited before his death be proved, or until he would have been ninety years of age, but must remain in trust until that time, when it will devolve upon those of his heirs who are in existence at that time. On the death of any of the relatives of a missing person, to whom he is an heir, he is so far considered to be alive, that his share is set aside, but such share is not reserved

(1) I. L. R., 1 All. 53.

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in trust for him and his heirs, but delivered to the other heirs, who would have taken it if he had been dead; if he returns after this, he will be entitled to his share, but if he does not return, it devolves on the heirs who came into possession at the former distribution, but not to the heirs of the missing person." Again: "If a missing person be a co-heir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead. Thus, in the case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son. In this case, the daughters will take half the estate immediately, as that must be their share at all events, but the grand-children will not take anything, as they are precluded on the supposition of their father being alive."

Farzand Ali became lost during the lifetime of his parents, and his daughter, the defendant, according to the view of the law expressed above, could not, under the circumstances, inherit.

For these reasons I would decree the appeal and reverse the judgment of the lower appellate Court and restore that of the Munsif with costs.

Stuart, C. J., and Spankie, J., differing on a point of law, the appeal was referred, under s. 575 of Act X of 1877, to Pearson, J., by whom the following judgment was delivered:

PEARSON, J.—The property in suit did not belong to Farzand Ali, the missing man, but would have been more or less inherited by him, had he survived his parents. The plaintiffs are his sisters and a cousin, who married one of them; the defendant is his daughter, and, if she be not entitled to the property, they are. Her contention is that her father is still alive, and, if the contention be true, it is apparent from the rules of Muhammadan law cited by my learned colleague Spankie, J., that she is not entitled to hold the property either as heir or trustee, although Farzand Ali may be entitled to it should he return. The plaintiffs do not assert that he is dead, but nothing has been heard of him since he disappeared in 1857, and the strong probability is that he died in the lifetime of his parents, in which case his daughter could not inherit, through him, any portion of their estate. This being so, in concurrence with

Spankie, J., I decree the appeal with costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

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*Appeal allowed.*

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

MAYA RAM AND OTHERS (DEPENDANTS) v. LACHHO (PLAINTIFF).\*

1880  
January 12.

*Pre-emption -- Wajib-ul-arz*

The greater portion of the lands of a certain village were divided into "thokes," each thoke comprising a certain amount of land, and the rest of the lands were held in common according to the interests of the co-sharers in the village. The *wajib-ul-arz* contained the following provision regarding the right of pre-emption: "Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer should be effected by him in favour of his own brothers and nephews who may be sharers, and, in case of their refusal, in favour of the other owners of the thoke." Held, in a suit by a sharer in one thoke to enforce a right of pre-emption, under the *wajib-ul-arz*, in respect of a share in another thoke, that the fact that the plaintiff in common with all the sharers of the different thokes was a sharer in the common lands did not make her a sharer in the vendor's thoke, and she had therefore no right of pre-emption under the *wajib-ul-arz*.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit Bishambhar Nath and Munshi Sukh Ram, for the appellants.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and Babu Oprokash Chandar Mukarji, for the respondent.

The judgment of the High Court (SPANKIE, J. and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The property in this suit, comprising the share in mauza Tholai belonging to Mahummad Ibrahim Khan, was sold by him to the defendants under a deed of sale dated 1st March, 1878, and the plaintiff claims the same by right of pre-emption under the *wajib-ul-arz*. The lower Court decreed the claim, and one of the objections taken in appeal is that, under the pre-emption clause in the administration-paper on which the plaintiff relies as her ground of action, she is not entitled to recover the property. The clause is as follows :—"Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer

\* First Appeal, No. 25 of 1879, from a decree of Maulvi Farid-ud-din Ahma4, Subordinate Judge of Aligarh, dated the 11th December, 1878.



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should be effected by him in favour of his own brothers and nephews who may be sharers, and in case of their refusal in favour of the other owners of the thoke: if they refuse to make the purchase, the transfer may be effected in favour of any one." The plaintiff does not come under the first description of persons named who have a right of pre-emption, and it only remains to be seen if she is a sharer in the vendor's thoke. It is shown from the record-of-rights, and there is no dispute on this point, that there are three thokes in this mauza, namely, the thoke of Ibrahim Ali Khan, vendor, the thoke of Musammat Lachho, plaintiff, and the thoke of Musammat Bhawani. Each of these thokes comprised a certain amount of the land of the mauza, which has been divided and formed into separate thokes. Thus thoke Ibrahim Ali Khan comprises 316 bighas 5 biswas, that of Musammat Bhawani 99 bighas 17 biswas, and that of the plaintiff 316 bighas 4 biswas. Besides the lands thus divided into thokes, there are some lands in the mauza left undivided and held in common by the sharers of the different thokes in which they have an interest in proportion to their fractional shares, but these lands do not form part of the thokes, but were left undivided when those thokes were formed. That this is the constitution of the mauza is clearly shown by a reference to the record-of-rights, where the total of land divided and comprising each thoke is first given, and then is entered the common land, as something outside the thokes.

Now plaintiff is not a sharer in the vendor's thoke, that is, in the divided land held by him separately, but she is, in common with all the sharers of the different thokes, a sharer of the common lands left undivided, and it is contended that on this ground she has a right of pre-emption. But this contention fails; the thoke as already stated is not composed of the common lands but of those divided, and a sharer in the former will not from that circumstance become a sharer in a thoke. The plaintiff not having shown that she is a sharer in the vendor's thoke has no right of pre-emption under the clause in the administration-paper. We therefore decree the appeal, and reverse the decree of the lower Court, and dismiss the suit with all costs.

*Appeal allowed.*

*Before Mr. Justice Pearson and Mr. Justice Spunkie.*

**GOBAR DHAN DAS (DEFENDANT) v. GOKAL DAS (PLAINTIFF).\***

1880  
January 15.

*Parol Conditional Mortgage—Regulation XVII of 1806.*

*K* made over to *G*, from whom he had borrowed certain moneys, certain land on the oral condition that, if such moneys were not repaid within two or three months, such land should become *G*'s absolutely. *Held* that as there was no deed of conditional mortgage the provisions of Regulation XVII of 1806 were not applicable to *G*, and he became the owner of such land after the expiry of three months from the date on which it was made over to him, in consequence of the amount of the loan not having been repaid to him.

On the 11th February, 1862, one Kishen Das purchased certain premises used as a stable, the vendor executing a deed of sale in his favour. In the beginning of 1869 Kishen Das, being indebted to one Gokal Das in the sum of Rs. 1,000, gave possession of the premises to Gokal Das and made over to him the deed of sale, on the oral understanding that if the debt were not paid in two or three months the premises should become the absolute property of Gokal Das. In July, 1869, Kishen Das became insolvent, and in the schedule of immoveable property filed by him in the Insolvent Court at Calcutta he stated as follows:—"I received the sum of Rs. 1,000 in the month of Phagun, Sambat 1925, as a loan from Gokal Das, Gujrati, and for the repayment thereof deposited the title-deeds of a piece of land at Muttra, in the North-Western Provinces, with this creditor, and I also agreed that in case I was not able to pay the amount the land would absolutely belong to him." In the statement of his immoveable property filed in the same Court he stated:—"A piece of land at Muttra, in the North-Western Provinces, mortgaged to my creditor No. 34 (Gokal Das) for Rs. 1,000 on condition that in case I am not able to pay the amount within two or three months he will be absolutely entitled to the land." Gokal Das remained in undisturbed possession of the premises until the 10th February, 1877, when Jagan Nath, the son of Kishen Das, executed a deed of sale of the premises in favour of Gobar Dhan Das, who thereupon interfered and prevented Gokal Das' tenant from paying rent to him as he had theretofore done. Gokal Das thereupon instituted the present suit in which

\*Second Appeal, No. 714 of 1879, from a decree of J. Alone, Esq., Subordinate Judge of Agra, dated the 20th March, 1879, affirming a decree of Maulvi Mubarak-ulla, Munsif of Muttra, dated the 3rd December, 1878.

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he claimed, amongst other things, a declaration of his proprietary right to the premises, and to be maintained in possession thereof, and the cancellation of the deed of sale dated the 10th February, 1877. The Court of first instance gave him a decree. On appeal the lower appellate Court held, in respect of the contention by the defendants that the possession of the plaintiff of the premises was only that of an equitable mortgagee, and that consequently he could not impugn the sale to Gobar Dhan Das by Jagan Nath, as follows :—“ In the case of *Goordyal v. Hunscoonwer* (1) the High Court said,—‘ It has been settled that a conditional sale may by the agreement and acts of the parties become absolute without (foreclosure) proceedings under the Regulation,’—and this appears to me to be the case here : I accordingly find that Gokal Das acquired the proprietary title to the property in suit in 1869, and that he has therefore the right to sue for the avoidance of the sale made by Jagan Nath to Gobar Dhan Das.”

The defendant Gobar Dhan Das appealed to the High Court contending that the lower appellate Court had erred in holding that the conditional sale to the plaintiff did and could become absolute without the issue of the notice of foreclosure required by s. 6 of Regulation XVII of 1806, and that the plaintiff was still only a mortgagee and could not therefore sue for the proprietary possession of the property.

Mr. Conlan and Babu Ratan Chand, for the appellant.

Mr. Howard and Lala Harkishen Das, for the respondent.

The judgment of the High Court (PEARSON, J. and SPANKIE, J.) was delivered by

PEARSON, J.—The provisions of Regulation XVII of 1806, to which the first ground of appeal refers, are only applicable to the holders of deeds of conditional mortgage. The plaintiff, appellant, was not the holder of such a deed; and the provisions of the Regulation aforesaid were not therefore applicable to him. This being so, we must hold that according to the condition on which the property was made over to him he became the owner of it after

(1), H. C. R., N.-W. P., 1867, p 176.

the expiry of three months from the date on which it was made over to him, in consequence of the amount of the loan not having been repaid to him. It thus appears that he had acquired a full proprietary right and title to the property before Kishen Das' insolvency. Accordingly we affirm the decree of the lower Courts and dismiss the appeal with costs.

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*Appeal dismissed.*

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*Before Mr. Justice Pearson and Mr. Justice Spankie.*

1880  
January 19.

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GANGA BISHESHAR (DEFENDANT) v. PIRTHI PAL (PLAINTIFF).\*

*Hindu Law—Power of the Father to alienate ancestral property.*

D, in pursuance of a promise to give his daughter a dowry, about two years after her marriage, made a gift of joint ancestral property to G, her father-in-law. P, D's son, sued his father and G to have the gift set aside as invalid under Hindu law. Held that the gift, not having been made with the plaintiff's consent, and not being for any purpose allowed by Hindu law, was invalid, and that the plaintiff was entitled to have it set aside, not to the extent only of his own share in such property, but altogether.

On the 25th April, 1872, about two years after the marriage of his daughter, one Debi Prasad executed a deed of gift of a certain share in a certain village, being the ancestral property of his family, in the favour of the defendant Ganga Bisheshar, the father-in-law of his daughter. The property purported to be transferred as the marriage portion of the daughter. In July, 1878, Pirthi Pal, the plaintiff, the son of Debi Prasad, sued his father and the defendant Ganga Bisheshar to have this deed of gift cancelled, on the ground that the alienation was invalid under Hindu law. The defendant Ganga Bisheshar set up as a defence to the suit, amongst other things, "that the deed of gift had been executed not only with the consent and knowledge of the plaintiff, but also with his aid, and the defendant had obtained possession by means of mutation of names, to which the plaintiff never took any exception," and that the plaintiff was not entitled to claim the cancellation of deed of gift in respect of the whole property, but in respect only of his own share. The Court of first instance determined that

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\* Second Appeal, No. 706 of 1879, from a decree of R. G. Currie, Esq., Judge of Gorakhpur, dated the 17th March 1879, affirming a decree of Hakim Bahat Ali, Subordinate Judge of Gorakhpur, dated the 24th December, 1878.

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the plaintiff had not consented to the gift, observing as follows:—  
“The consent of the plaintiff has not been proved in any way: had he consented he would have been made to affix his signature to the deed of gift; no documentary evidence is forthcoming to establish his consent.” It further determined that the deed of gift should be cancelled altogether. The lower appellate Court concurred in the opinion of the Court of first instance, observing as follows:—“I do not consider it is proved that the deed was executed with the consent and admission of the plaintiff; it was so necessary a point to legalise the father’s action in this particular, that if the son, the plaintiff, had been a consenting party, it is scarcely credible that this should not have been clearly shown at the time by some entry in the body of the deed or by making the son a witness to the deed: this is the finding of the lower Court, and I concur in it: I quite acknowledge that the oral testimony in this point is decidedly better for the defendant, appellant, than for the plaintiff, respondent, but I cannot credit it sufficiently against strong probabilities and the absence of all documentary evidence, nor can I accept the copy of a deposition of Pirthi Pal, dated 24th July, 1874, as sufficient to prove his knowledge and acquiescence: it is too roundabout a story, and even if allowed that the plaintiff did know at that time, I cannot admit that by the law-texts quoted, he can be held to have ratified the act and to be barred from bringing this suit: the first quotation is from Tagore Law Lectures, 1871, p. 7:—‘He can interdict acts of waste, but if he does not do so and is cognisant of the transaction, and specially if he derives any benefit from it, he will be held to have impliedly consented to it.’—Well, he most certainly did not derive any benefit, and the force of the passage, I take it, turns upon that, as does also the quotation in the case of *Gopal Narain Mozoomdar v. Muddomuty Guptee* (1)—‘of which he is aware and of which he has had the benefit.’ The appellant making so great a point of the son’s consent and admission virtually acknowledges that without such consent and admission the act of the father is illegal, and the quotations and precedents,—Tagore Law Lectures, 1871, p. 12, ‘As early as 1824, the question, &c’: Woodman’s Digest of Bengal Law Reports, p. 284, 16: Vyavastha Chandrika, vol. i, pp. 35 and

(1) 14 B. L. R. 32.

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36, s. 31—put forward by the respondent are, I think, conclusive and definitive, this being undeniably joint undivided property: but the appellant does deny it or attempts to throw doubt on the applicability of the above quotations and precedents by quoting the cases—*Venkataramayyan v. Venkatasubramania Dikshatar* (1) and *Deendyal Lal v. Jugdeep Narain Singh* (2). But these are special cases relating to forcible sales not to free-will transactions, and in the heading of the latter is this—‘*Quære.*—Whether, under the law of the Mitakshara, in Bengal, a voluntary alienation by one co-sharer, without the consent of the rest, of his undivided share in joint ancestral property is valid’? I hold these precedents as irrelevant and the latter telling rather against than for the appellant who put it forward.”

The defendant appealed to the High Court.

Lala Lalta Prasad, for the appellant.

The Senior Government Pleader (Lala Juala Prasad) and Shah Asad Ali, for the respondent.

SPANKIE, J.—The appellant before us was the appellant before the Judge, and he urged, first, that the deed impeached had been executed with the consent and admission of the plaintiff, respondent, who had remained silent from 1872 to 1878, having thus ratified his father’s act; secondly, that the plaintiff could not sue under any circumstances to set aside the gift save with respect to his own share, *viz.*, two annas and two pies in the property in suit. The Subordinate Judge held that there was no proof of consent on the part of the plaintiff and no sufficient evidence of acquiescence in what was done by the father. He also appears to hold that the plaintiff could sue to set aside the deed altogether, and not only in regard to his own share. We must not lose sight of these objections which the Court below had to determine. Before us the first plea goes beyond the objections urged before the lower appellate Court and contends that, as the transfer was not made for any illegal or immoral purposes, the suit was not maintainable. The other pleas go to the plea of consent and acquiescence and

(1) I. L. R. 1 Mad. 358. (2) I. L. R. 3 Calc. 198.

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that of the limitation of plaintiff's right to sue to the extent of his own share only.

With respect to the plea of consent and acquiescence, I do not think that we can interfere with the Judge's finding. The admission of the Judge that the evidence on this point on the part of appellant is preferable to that on the part of defendant does not extend beyond the parol evidence. He assigns reasons for not crediting this evidence, and on the entire evidence before him he arrives at the same conclusion at which the first Court had arrived. The finding therefore is not one with which we could interfere on this appeal. I understand the finding of both the lower Courts to be that the transfer was not made for any necessary purpose allowed by the Hindu law. The deed of gift appears to have been made by the father in performance of a promise to give a dowry to his daughter. But I am not aware that the performance of such a promise can be regarded as a lawful purpose justifying alienation under the Hindu law. It was not necessary for the support of the daughter, it was not for any religious or pious work, nor was it a pressing necessity. Daughters must be maintained until their marriage and the expenses of their marriage must be paid. But in this case the gift was not made at the time of the marriage. It was not executed until two years after the marriage. There is, I think, force in the Subordinate Judge's observations that the great stress laid upon the alleged consent, acquiescence, and aid of the plaintiff in effecting the transfer, is a circumstance going to show that without such consent the transfer was illegal. The first plea, upon the Subordinate Judge's finding, in my opinion, fails.

I have already given my opinion regarding the second plea. As to the third, the property being admittedly joint and undivided, and the gift not having been made with the consent of the plaintiff, and not being for any purpose allowed by the Hindu law, the plaintiff was at liberty to set it aside altogether; and in arriving to this conclusion the lower appellate Court does not appear to have misunderstood any of the precedents cited before him. I would dismiss the appeal and affirm the judgment with costs.

PEARSON, J.—I concur.

*Appeal dismissed.*

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

**MATHURA PRASAD (PLAINTIFF) v. DURJAN SINGH AND ANOTHER**  
(DEFENDANTS).\*

1880  
January 19.

*Bond—Interest.*

*D* gave *M* a bond for the payment of certain moneys on a certain date and for the payment of interest on such moneys at Re. 1-12 0 per cent. per mensem, stipulating to pay the interest six-monthly, and in default "to pay compound interest in future." Held (i) that the stipulation to pay compound interest could not be regarded as a penal one, and (ii) that the bond contained an agreement to pay interest after the due date at the rate payable before that date, and that if it had been otherwise, the obligee was entitled to interest after that date at that rate, such rate not being unreasonable.

On the 12th December, 1872, one Gopal Singh executed a bond in favour of one Jugal Kishore, in which, after promising to pay him Rs. 200 on the 4th November, 1873, and to pay him interest on that sum at Re. 1-12-0 per cent. per mensem, and hypothecating certain immoveable property as collateral security for the payment of such moneys, he promised and agreed as follows: "Until the loan is repaid I shall not alienate the said property by sale, mortgage or otherwise: if I do, the alienation shall be invalid: I shall pay the interest every six months, and if I do not pay it every six months, I shall in that case pay compound interest in future: if I fail to pay the loan with interest at the stipulated time, the creditor shall be at liberty on the expiry of the period to realise his money from me and my property in the best way he can." On the 3rd September, 1878, the obligor not having paid anything on the bond, the plaintiff, the assignee of the bond, sued upon it, claiming the principal amount, Rs. 200, and Rs. 425-8-0, compound interest, from the date of the bond to the date of the suit at Re. 1-12-0 per cent. per mensem. The Court of first instance held that the stipulation in the bond regarding compound interest was of a penal nature, and awarded the plaintiff compound interest at the rate only of eight annas per cent. per mensem. It also held that there being no stipulation in the bond fixing the rate of interest to be paid after the date the bond became due, the plaintiff was only entitled to interest after that date at the prevailing rate,

\* Second Appeal, No. 792 of 1879, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 5th April, 1879, modifying a decree of Hakim Bahat Ali, Munsif of Mainpuri, dated the 9th November, 1873.



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*viz.*, one rupee per cent. per mensem. On appeal by the plaintiff the lower appellate Court held that no compound interest at all could be awarded to him, but gave him interest from the date the bond became due at the rate stipulated to be paid before that date, *viz.*, Re. 1-12-0 per cent. per mensem, with reference to the case of *Baldeo Pandey v. Gokal* (1).

The plaintiff appealed to the High Court contending that under the terms of the bond he was entitled to compound interest.

Pandit *Nand Lal*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

SPANKIE, J.—The first condition of the deed was that the money borrowed should be repaid with interest at the rate of Re. 1-12-0 per cent. per mensem on Katik Sudi Puran Mashi, Sambat 1930. The next condition is that for the further satisfaction of the creditor the debtor hypothecates certain property until repayment of the loan, promising not to alienate the same in any form or shape. The third condition is that the debtor will pay interest every six months, and if he fails to do so, he will pay compound interest in future. Then comes the fourth condition that if he fails to pay the loan with interest at the stipulated time, the creditor shall be at liberty to realise the money from the debtor personally and from his property in the best way he can. The case appears to me to be very similar to that of *Baldeo Pandey v. Gokal* (1) to which I was a party. If the debtor was unable to repay the money at the stipulated time, the creditor would allow it to remain out with the debtor on the understanding that the property hypothecated remained hypothecated for principal and interest until repayment. The stipulation regarding the payment, not the rate, of interest is perhaps rather a declaration as to the mode of payment than a condition. But there is the condition in case of failure "to pay compound interest for the future," that is to say, until repayment. I fail to perceive on what principle it should be assumed that the creditor would allow his money, payable at a particular date, to remain unpaid, but would content himself with less interest than that at which he originally lent the money. I hold that the deed

(1) I. L. R., 1 All. 603.

contains a contract for the payment of interest after due date at the rate of Rs. 1-12-0 which was payable before due date, and that on any default compound interest might be charged. If I did not hold this view, I should then be of opinion that the plaintiff was entitled to the interest claimed, as there does not seem to be anything unreasonable in the rate agreed upon as interest for the money lent or in the arrangement provided in case of default.

The Subordinate Judge has found that the covenant to pay compound interest must be regarded as a penal clause in the deed. I do not think that it is so, and there is nothing in the law which forbids a decree for such interest when there has been an agreement to pay it. I would modify the judgment and allow compound interest which has been disallowed by the Subordinate Judge, thus decreeing the appeal with costs.

OLDFIELD, J.—I concur in the proposed order.

*Appeal allowed.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr Justice Straight.*

NAND RAM (DEFENDANT) v. RAM PRASAD (PLAINTIFF).\*

1880  
January 19.

*Suit for money on accounts stated—Act IX of 1871 (Limitation Act), sch. ii, art. 62—  
Note or memorandum whereby an account is expressed to be balanced—Act XVIII  
of 1869 (Stamp Act) sch. ii, No. 5—Stamp—Limitation.*

On the 9th October, 1875, the book containing the accounts between the plaintiff and the defendant, kept by the plaintiff, was examined by the parties, and a balance was struck in the plaintiff's favour which was orally approved and admitted by the defendant. On the 2nd April, 1877, the plaintiff sued the defendant for the amount of this balance "on the basis of the account-book." *Held* that the suit was in effect one on accounts stated falling within art. 62, sch. ii of Act IX of 1871, and could be brought within three years from the 9th October, 1875, for the total balance struck, and being so brought was within time.

*Held* also that the entry of the balance struck, not being signed by the defendant, was not a note or memorandum of the kind mentioned in No. 5, sch. ii of Act XVIII of 1869, and did not therefore require to be stamped.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

\* Second Appeal, No. 745 of 1879, from a decree of W. C. Turner, Esq., Judge of Cawnpore, dated the 3rd April, 1879, affirming a decree of Babu Ram Kali Chandhuri, Subordinate Judge of Cawnpore, dated the 28th March, 1878.

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v.  
RAM PRASAD.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent.

The following judgments were delivered by the Court :

STRAIGHT, J.—This was a suit brought by the plaintiff, respondent, to recover the sum of Rs. 4,765, principal and interest, on the basis of an account-book. The plaintiff carries on business at Cawnpore under the style of Nand Ram and Babu Ram, while the defendants trade at Shikohabad as Nand Ram and Golab Chand. As far back as the year 1869 there were dealings between the plaintiff and defendants, the latter forwarding goods for sale to Cawnpore, drawing on the plaintiff against such goods, and occasionally making purchases through him for the purposes of their business at Shikohabad. On the 9th of October, 1875, Mohan Lal, one of the defendants, was at Cawnpore, and upon that day the accounts between the two firms were gone into and a balance was struck, the amount ascertained as being due from the defendants to the plaintiff being Rs. 4,198-4-9. Upon a promise of Mohan Lal to pay Rs. 3,598-4-9 of this amount within two weeks the plaintiff undertook to forego the other Rs. 600, which were, however, to be recoverable, if the debt was not paid within the time specified. The Rs. 3,598-4-9 were not paid according to promise, and ultimately upon the 2nd April, 1877, the present suit was brought. For the purposes of this judgment it is sufficient shortly to say that the pleas of the defendant Nand Ram were to the effect, that the claim was barred by limitation, that Mohan Lal had no authority to bind his firm at the adjustment of accounts; and in this and the lower appellate Court the further ground was taken, that the entry in the plaintiff's books of the balance struck was in the nature of a note or memorandum of the character contemplated by No. 5, sch. ii, Act XVIII of 1869, and that not being stamped it was inadmissible in evidence to take the claim out of limitation. Further, that as such a note or memorandum, being liable to only a one anna stamp, and not having been stamped at the time of execution, it was useless according to the provisions of s. 23 of the Stamp Act of 1869. The first Court decreed the plaintiff's claim and that decision was upheld by the Judge.

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It has been found as a fact that Mohan Lal had full authority on the 9th of October, 1875, to act on behalf of the defendant's firm in the adjustment of the accounts, and the only points to be considered by us in special appeal appear to be, first, Is the plaintiff's claim barred by limitation? secondly, Is the entry in the books of the plaintiff, striking the balance, one that requires a stamp, as provided by No. 5, sch. ii of the Stamp Act of 1869?

The matter was very fully argued before us on the part of the appellants, but the contentions of their learned pleader were based upon a misconception of the nature of the claim. The form of action "on accounts stated" is a perfectly well-understood one, and the use of the term "on account-book" in the present plaint is only another way of describing a suit of such a description. It must be taken as proved that upon the 9th October, 1875, the accounts of the transactions between the plaintiff and the defendants were submitted to Mohan Lal, and that the items were checked and the balance struck was approved by him upon that date. In effect it comes to this, that upon such day the sum of Rs. 4,198-4-9 was found to be due from the defendants to the plaintiff on accounts stated between them. Consequently, I am of opinion that the form of the plaintiff's present claim properly falls within cl. 62 of the second schedule of Act IX of 1871; that it was competent for the plaintiff to bring his suit within three years of that date for the total balance struck; and that having instituted the present proceedings on the 2nd April, 1877, he is within time.

As to the second point taken on behalf of the appellants, I do not think that the entry in the ledger of the plaintiff stating the balance on the debit side of the defendants' account, which was approved and admitted by Mohan Lal, is a note or memorandum of the kind mentioned in No. 5, sch. ii of the Stamp Act of 1869. As I intimated at the time of the hearing, I think that the writing therein contemplated is intended to be signed by the person to be charged with it, admitting that an account due to him has been balanced, or that a debt payable by him is due. Such entry as we have in the present case is no evidence of the admission of liability, but it is evidence of the debt being due and of the

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v.  
**RAM PRASAD.**

account having been stated. This latter fact being proved it was competent for the lower Courts to accept Mohan Lal's acknowledgment, oral though it be, and they would appear most properly to have found the liability of the defendants established. I would dismiss the appeal with costs.

STUART, C. J.—I entirely approve and concur in my honourable and learned colleague's examination of this case. It is quite clear that the three years' limitation had not run and that the suit was within time, and that being so, perhaps the question respecting the admissibility of the note or memorandum which was argued to fall within the terms of No. 5, sch. ii, Act XVIII of 1869, is not very material. But I may observe that I agree with Mr. Justice Straight that this is not such a note or memorandum, and that to be liable to stamp-duty it ought to be signed or otherwise proved as a note or memorandum separate and distinct in itself, and not as here, as a mere summing up in the way of a continued account without any special acknowledgment. The appeal is dismissed with costs.

*Appeal dismissed.*

1880  
*January 19.*

## CRIMINAL JURISDICTION.

*Before Mr. Justice Straight.*

EMPRESS OF INDIA v. AJUDHIA.

*Trial of more than one offence—Joinder of charges—Limit of conviction—Act X. of 1872 (Criminal Procedure Code), ss. 314, 452, 454, 455—Act XLV of 1860 (Penal Code), s. 71.*

*Held that, where in the course of one and the same transaction an accused person appears to have committed several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been committed, yet in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the gravest offence proved.*

Where, therefore, a person who broke into a house by night and committed theft therein was charged and tried for offences under ss. 380 and 457 of the Penal Code, and was convicted of both those offences, and punished for each with rigorous imprisonment for eighteen months, the Court convicted him of the offence

under s. 457 and sentenced him to rigorous imprisonment for three years, and acquitted him of the offence under s. 380.

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THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. On the night of the 4th September, 1878, the petitioner broke into the dwelling-house of one Hem Raj and stole certain property therein. On the 21st March, 1879, he was convicted by Mr. J. W. Muir, Magistrate of the first class, under s. 380 of the Indian Penal Code, of the offence of theft in a dwelling-house, and under s. 457 of that Code of the offence of house-breaking by night in order to the commission of theft, and punished for the former offence with rigorous imprisonment for one year, and for the latter with rigorous imprisonment for the same period. On appeal by the petitioner to the Court of Session that Court enhanced the punishment that had been awarded, sentencing the petitioner to rigorous imprisonment for eighteen months in respect of each offence.

Mr. Chatterji, for the petitioner.

STRAIGHT, J.—I must accept the findings of fact. The accused within a very short period of the theft was in possession of the stolen property, and I cannot say the Magistrate was wrong or that the evidence was insufficient in point of law to justify him in convicting. A question has been raised before me on the part of the applicant that his conviction on ss. 380 and 457 of the Penal Code for one and the same offence is illegal, and that he has been improperly sentenced to two distinct and excessive sentences. Although I am not disposed to hold at the present moment that this contention is sound to the full extent urged, yet I think that the spirit of the Criminal Procedure Code, ss. 314 and 452, 454 and 455, taken with s. 71 of the Penal Code, as well as convenience of practice, are best consulted by a different course being pursued to that adopted in the present case. It is true that the facts disclosed are consistent both with a charge of "theft in a dwelling house" under s. 380 and to one of "lurking house-trespass and house-breaking by night with intent to commit theft" under s. 457, but the latter is the more serious and aggravated form of crime involving all the elements of the former, and if the proof is sufficient to justify a conviction, it should in my judgment be passed and the punishment inflicted

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for the graver offence of the two of which the accused is found to be guilty. It is a common practice in England in framing indictments to vary the description of the crime in several counts, *e. g.*, a man is charged with wounding with intent to murder, to do grievous bodily harm, to commit a felony, or to resist or prevent his lawful apprehension and detainer, but the conviction would only be recorded on one of the counts and of course upon that for the most serious offence proved, which would dispose of or include all those subordinate and negative the others superior to it. Equally the sentence would only be passed upon the one count, that substantially representing and containing within its four corners the real offence committed, as to the more or less aggravated character of which the amount of punishment would have to be calculated. Where in the course of one and the same transaction an accused person appears to have perpetrated several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been committed, yet in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the gravest offence proved. This I think should have been done in the present case, and I accordingly direct that the following amendment be made in the record. The applicant, Ajudhia, is convicted on s. 457 of the Penal Code of "house-breaking by night in order to commit theft," and is ordered to be rigorously imprisoned for the period of three years from the 21st March, 1879. For formal purposes I order that judgment of acquittal be entered upon the charge under s. 380 of the Indian Penal Code.

## APPELLATE CRIMINAL.

*Before Mr. Justice Straight.*

EMPEROR OF INDIA v. MULU.

*Trial by the Court of Session—Admissibility of evidence given at preliminary inquiry by absent witness—Confession made by one of several persons being tried jointly—Act X of 1872 (Criminal Procedure Code), s. 249—Act I of 1872 (Evidence Act), ss. 30, 33.*

1880  
January 19.

*Held* that it is only in extreme cases of delay or expense that the personal attendance of a witness before the Court of Session should be dispensed with, and the evidence given by him before the committing Magistrate referred to.

*Held* also, where a person being tried jointly with other persons made a statement deprecating any guilty knowledge and seeking to clear himself at the expense of such other persons that such statement could not be taken into consideration under s. 30 of Act I of 1872 against such other persons. *Queen v. Belat Ali* (1) and *Empress v. Ganraj* (2) followed.

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THREE persons, named severally Mulu, Deodat, and Khilla, were committed for trial before the Court of Session charged with dishonestly receiving certain property stolen in the commission of a dakaiti, an offence punishable under s. 412 of the Penal Code. The Sessions Judge, Mr. F. E. Elliot, considered that the charge upon which the accused persons had been committed was improper, and altered it to one under s. 411 of the Code of dishonestly receiving the property knowing it to be stolen. Ganga Prasad, the owner of the property, was absent at the trial, and the Sessions Judge referred to the evidence given by him before the committing Magistrate to prove that the property was stolen property, and eventually convicted the accused persons under s. 411 of the Penal Code. Mulu appealed to the High Court.

Mr. Niblett, for the appellant, contended that the conviction was improper, there being no evidence that the property was stolen, inasmuch as the evidence of Ganga Prasad taken before the committing Magistrate was inadmissible.

STRAIGHT, J.—I had at one time the intention of disposing of the case in its present condition, but upon carefully going over it I feel that to do so would be to countenance an irregularity of procedure that ought not to be passed over. I refer to the reading of the deposition of Ganga Prasad in the Sessions Court to prove the loss and identity of the articles found in the possession of the accused. It was absolutely inadmissible under s. 249 of the Criminal Procedure Code, and there is no evidence upon the record, nor do I believe was there any taken, to permit the application of s. 33 of the Evidence Act. As to s. 249, that has no applicability to a case like the present, and is intended to provide for the contingency,

(1) 10 B. L. R., 453. (2) I. L. R., 2 All. 444.



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that may arise, when a witness, who is *produced* before the Court of Session holds back information and evidence and tells a different story to that which he gave in the preliminary inquiry before the Magistrate. With regard to s. 33 of the Evidence Act it is true that it makes a statement "given by a witness in a judicial proceeding relevant for the purpose of proving in a subsequent judicial proceeding the truth of the facts which it states," in the following emergencies: (i) When the witness is dead: (ii) When he cannot be found: (iii.) When he is incapable of giving evidence: (iv.) When he is kept out of the way by the adverse party: (v.) When his presence cannot be obtained without an amount of delay or expense which under the circumstances the Court considers unreasonable. But in my opinion it was intended that the provisions of the section as to emergency (v.) were only to be sparingly applied, and certainly not in a case like the present, where the witness was alive and his evidence reasonably procurable. Assuming, however, that there were reasons why the Court of Session thought fit to dispense with Ganga Prasad's personal attendance, and circumstances were disclosed showing that his presence could not be obtained without an unreasonable amount of expense and delay, the evidence to supply such reasons and to prove such circumstances should have been formally and regularly taken and recorded. It is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with, and there is an entire absence, as far as I can see in this case, of anything to establish those grounds for applying s. 33 of the Evidence Act. The reading of the evidence of Ganga Prasad as given by him in the Magistrate's Court was therefore irregular and improper. I further remark in his judgment that the Sessions Judge has allowed his decision to be influenced by the statement of Deodat, and that under s. 30 of the Evidence Act he has "taken it into consideration" against the two other accused. In this respect I think he was also in error. The account of the transaction given by Deodat is in no sense a confession, on the contrary he deprecates altogether any guilty knowledge, and seeks to clear himself at the expense of his co-prisoners. The case of *Queen v. Belat Ali* (1) deals very fully

(1) 10 B. L. R., 453.

with this point, and I have also myself had at some little length to discuss it in the case of *Enpress v. Ganraj* (1). Therefore the statement of Deodat should have had no weight against Mula or Khilla.

Much as I regret to have to do so I must send this case back for further inquiry before the Sessions Judge without the assessors, such inquiry to be conducted in the presence of the three accused, who are to be afforded every opportunity for cross-examination, and the further proof is to be directed to establish the loss of the several articles and their identity by Ganga Prasad. In addition to this I desire fuller evidence of what was said by Mulu and Khilla, each individually, as to the property found in the well both before and at the time of its being found, whether both or which of them went down the well, and what the date was on which Mulu gave any intimation that he could restore some of the property. When this evidence has been taken it must be returned certified to the Court, which will then proceed to dispose of the appeal.

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## APPELLATE CIVIL.

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 1880  
January 26.
 

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*Before Mr. Justice Oldfield and Mr. Justice Straight.*

BACHCHU (PLAINTIFF) v. MADAD ALI (DEFENDANT). \*

*Act X of 1877 (Civil Procedure Code), s. 210—Decree for money.*

There is nothing in s. 210 of Act X of 1877, or elsewhere in that Act, authorising a Court to direct that the amount of a decree should be paid within a fixed time from its date. *Semble* that the provisions of s. 210 of Act X of 1877 are not applicable in a suit for the recovery of the amount of a bond-debt by the sale of the "nankar" allowance hypothecated by such bond.

THE plaintiff sued to recover Rs. 177 on a bond, from the defendant, personally, and by the sale of a "nankar" allowance of Rs. 106-2-0, which was paid annually to the defendant by certain lessees of his, and which allowance the defendant had hypothecated

(1) I. L. R., 2 ALL. 444.

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\* Second Appeal, No. 897 of 1879, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 19th May, 1879, affirming a decree of Munshi Madho Lal, *Munsif* of Mirzapur, dated the 18th January, 1879.

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in the bond as security for the payment of the amount thereof. The Court of first instance gave the plaintiff a decree for the amount claimed by him against the defendant and against "the mortgaged property," and directed that "the defendant should pay the amount of the decree within two years as stipulated by him." On appeal by the plaintiff from the decree of the Court of first instance the lower appellate Court observed: "The Court finds that though the lower Court has not stated in writing its reasons for ordering payment by instalments, yet there are good and sufficient reasons for the order: the value of the property sought to be brought to sale is out of all proportion to the sum decreed: secondly, it appears that the defendant is willing and has endeavoured to meet his engagements." The plaintiff appealed to the High Court.

Munshi *Hanuman Prasad*, for the appellant.

The respondent did not appear.

The judgment of the Court (OLDFIELD, J. and STRAIGHT, J.) was delivered by

OLDFIELD, J. —The defendant borrowed from the plaintiff the sum of Rs. 125 at one per cent. interest per mensem, pledging as security an annuity of Rs 106-2-0, called "*nankar*" allowance, which the defendant received from the firm of Sadaranji and Jai-ramji, and the plaintiff has brought this suit to recover the money lent with interest, by enforcement of the lien on the annuity pledged in the bond and against the defendant personally. The Court of first instance decreed the claim, with costs and interest at eight annas per cent. per mensem, but in the decree allowed the defendant a period of two years for payment of the amount decreed. The lower appellate Court affirmed the decree. The plaintiff in second appeal has objected to that part of the decree allowing the defendant the option to pay within two years, and there is no doubt the objection is valid.

The effect of the order of the Court is that the decree-holder is debarred from taking out execution of his decree or having it satisfied till the expiry of two years from date of the decree, and there is

no authority in the Civil Procedure Code for a Court to make such an order. Under s. 210 in all decrees for the payment of money the Court may for sufficient reason order that the amount shall be paid by instalments, but this section is inapplicable, for the decretal order is not for payment by instalments, and it is doubtful whether the section will apply to a decree of the nature of the decree made in this suit, which is for something more than the payment of money. Moreover, it cannot be held that any sufficient reason is shown in this case for allowing defendant time for payment. We decree the appeal with costs, and modify the decrees of the lower Courts, by cancelling that portion which allows two years within which the amount decreed is to be satisfied.

*Appeal allowed.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

GANGA PRASAD (PLAINTIFF) v. GAJADHAR PRASAD AND OTHERS  
(DEFENDANTS).\*

1880  
January 29.

*Mesne profits—Procedure on the hearing of appeal—Objection—Act X of 1877  
(Civil Procedure Code), ss. 211, 561.*

Where the parties to a suit for certain land and for the payment of mesne profits in respect of the same were co-sharers in the estate comprising such land, and the defendants had themselves occupied and cultivated such land, *held* that the most reasonable and fitting mode of assessing such mesne profits was to ascertain what would be a fair rent for such land if it had been let to an ordinary tenant and had not been cultivated by the defendants.

Both parties appealed from the decree of the Court of first instance, and both the appeals were dismissed by the lower appellate Court. The plaintiff appealed to the High Court from the decree of the lower appellate Court dismissing his appeal, whereupon the defendant took objections to the decree of the lower appellate Court dismissing his appeal. *Held* that such objections could not be entertained.

THIS was a suit in which the plaintiff claimed the possession of 37 bighas 5 biswas of land and Rs. 883-13-0 the mesne profits of the land for 1283 and 1284 fasli. The plaintiff claimed under an agreement for the partition of his share and that of the defendants in a certain mahal, under which partition the land in suit had fallen to the share of the plaintiff. The plaintiff estimated

\* Second Appeal, No. 1151 of 1878, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 18th June, 1878, affirming a decree of Maulvi Muhammad Wajeh-ulla Khan, Subordinate Judge of Mirzapur, dated the 23rd April, 1878.

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the mesne profits for the years 1283 and 1284 fasli in manner following, that is to say, he stated the produce of the land for each year to be eight maunds per bigha, the total being 298 maunds for each year : he then deducted 37 maunds 5 seers on account of the seed, making the net produce for each year 260 maunds 35 seers : he then valued the produce for each year at Re. 1-8-0 per maund, which made the value of the produce for each year Rs. 391-2-0 : he then added for each year Rs. 93-2-0 as the value of the straw, and then deducted the same sum on account of the expenses of cultivation, thus making the total value of the mesne profits for each year, without interest, Rs. 391-2-0. The defendants set up as a defence to the suit, amongst other things, that the land in suit was held by them before the partition as *sir*-land, and had been so held by them after the partition, and that under the circumstances they were entitled to remain in possession of the land, and the plaintiff could only claim rent from them in respect thereof. The Court of first instance held that under the terms of the agreement for partition any land held as *sir* by the one party was to be surrendered if it fell under the partition to the share of the other party, and gave the plaintiff a decree for the possession of the land claimed. With regard to the mesne profits the Court dismissed the claim observing as follows : "The Court finds that the evidence as to the produce claimed is not satisfactory : the witnesses are not unanimous in their statements, and are not trustworthy, and are also at enmity with the defendants." On appeal by the plaintiff from the decree of the Court of first instance the lower appellate Court observed as follows : "The appellant (plaintiff) claims for profits which he would have made had he not been kept out of the land the subject of suit : the lower Court has found that the evidence as to the produce of the land is not satisfactory, and this Court must agree with the lower Court : appellant has assumed the produce of 37 bighas 5 biswas to be eight maunds per bigha, and the value of the *bhusa* to be Rs. 90, and after deducting one maund per bigha for cost of seed, Rs. 93 for costs of cultivation, claims the balance : this account is most unsatisfactory : the Court cannot accept that wheat and barley only were sown, nor can it accept an account which makes the out-turn the same of each field : on an area of 37 bighas the crops sown

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would vary according to the crop and the soil, and the value of the crop according to its amount and kind : the appellant urges that if he is not to obtain a decree for the profits under his estimate he is at all events entitled to the rent recorded against the land : the Court finds that this has been deposited in the Collector's treasury, and remains but to be claimed and taken by appellant : the Court is far from thinking that the rent deposited is a fair equivalent for the use of the land, but it rested with appellant to show what was a fair profit to have been derived from the land, and the Court cannot accept the appellant's account as a fair one, he having failed to show that it is such." The defendants also appealed from the decree of the Court of first instance, the lower appellate Court dismissing their appeal.

The plaintiff appealed to the High Court contending that the lower appellate Court should have determined what was a proper amount to allow as mesne profits, and have given him a decree for that amount. The respondents objected that they had acquired a right of occupancy in the land in suit and could not be dispossessed.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Lala Lalia Prasad*, for the respondents.

The High Court (STUART, C. J. and SPANKIE, J.) remanded the case to the lower appellate Court for the trial of the issue stated in the following

**ORDER OF REMAND.**—Appellant appears to have claimed a larger share of profits than he was entitled to, or at least to have asked for the same out-turn from each field, which the Judge rightly regards as an unsatisfactory account of the profits. The defendants furnished no accounts. Mesne profits (*Explanation*, s. 211 of Act X of 1877) mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received, therefrom. Applying this rule to the particular circumstances of the case in which both parties are shareholders in the estate, and defendants themselves occupied and cultivated the lands in suit, the most reasonable and fitting mode of assessing the amount to which the plaintiff is en-

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titled would be to ascertain and determine what would be a fair rent for the land, if it had been let to an ordinary tenant and had not been cultivated by the respondents themselves. The rent recorded in the rent-roll is probably that paid by sir-lands, and if so the plaintiff seems to be entitled to the rent which the respondents could have obtained from a tenant, if they had not kept the lauds in their own hands. We remand the case to the Judge to enable him to ascertain and determine what the rent should be. On receipt of his finding one week might be allowed for objections, and at the end thereof the appeal as regards appellant will be disposed of.

With regard to the objections put in by the respondents, they cannot be admitted. These objections are in fact an appeal from the decree passed against respondents in this case, on the appeal brought by themselves against the original decree of the first Court. Under s. 561 of Act X of 1877 a respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal. But in the case now before us the appellant lost his appeal, and there was no objection which respondents could have taken by way of appeal to this Court against the decree of the lower appellate Court. They might have appealed from the decree on their own separate case of appeal, but in the particular case before us the decree of the lower appellate Court was one dismissing the appeal of the present appellant. We may add that if the objections by way of appeal in their own case could be received, they would fail as they impugn the finding of the Court in that case on a matter of fact, and there are no legal grounds for a second appeal.

### FULL BENCH.

1880  
January 31.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

REFERENCE BY BOARD OF REVENUE, N.-W. P., UNDER ACT I OF 1879.

*Stamp—Bond—Agreement—Act I of 1879 (Stamp Act) ss. 3, cl. (4), 7, and sch. i, No. 5, (c).*

One of the clauses of an instrument by which one party to the instrument bound himself, in the event of a breach on his part of any of the conditions of

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the instrument, to pay the other party thereto a penalty of Rs. 5,000, being regarded as a "bond," within the meaning of Act I of 1879, such instrument, if that clause were not so regarded, being an agreement chargeable under that Act with a stamp-duty of eight annas, *held* (STUART C. J. dissenting) that the instrument was chargeable, under s. 7 of that Act, with the stamp-duty leviable on a bond for Rs. 5,000.

*Per* STUART, C. J.—That for the purposes of that Act the penal clause in the instrument should not be regarded separately, as a bond, but simply as one of the several clauses making up the entire agreement, and the instrument was only chargeable with a stamp-duty of eight annas.

THIS was a reference by the Board of Revenue, North-Western Provinces, under s. 46 of Act I of 1879, as to the amount of stamp-duty chargeable upon an instrument, the terms of which, so far as they are material, were as follows: "Articles of agreement made this—— day of—— in the year of our Lord one thousand eight hundred and seventy-nine, between the Collector of Allahabād on behalf of Government of the one part, and Nilcomal Mittra and Charu Chandra Mittra, both of Allahabad, carrying on business under the name and firm of Nilcomal Mittra and Son, and so hereinafter designated, of the other part. Whereas the aforesaid Nilcomal Mittra and Son hereto of the second part, being desirous of obtaining for themselves the monopoly of the right of manufacture and vend of rum and native or country spirits in and for the city and cantonments of Allahabad, and for the manufacture and sale of country spirits according to the farming system in pargana Chail and the Trans-Jumna parganas, *viz.*, Khairagarh, Bara, and Arail, all of the Allahabad District, for the period of three years certain, commencing from the first day of October, 1879, have applied to the Collector aforesaid for the same, and whereas the said Collector of Allahabad has been authorised by and with the sanction of the Board of Revenue for the North-Western Provinces to grant the same: It is hereby agreed between the said parties hereto as follows:—

"(i). That in consideration of the payment of Rs. 20,000 per annum as still-head duty for 5,000 gallons of rum, and Rs. 1,200 per annum for license fees on rum, and Rs. 3,000 per annum on account of license fees on native spirits, for the city and cantonments of Allahabad, agreed to be paid by the said Nilcomal Mittra and Son unto the Collector of Allahabad aforesaid in the manner hereinafter specified, the said Nilcomal Mittra and Son shall have the



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exclusive right of manufacturing rum, *i. e.*, spirits manufactured according to the English method, and shall have the exclusive right of sale of the rum so manufactured by them and of country spirits manufactured by them after the native method in and for the city and cantonments of Allahabad, the abkâri jurisdiction of which extends to a radius of four miles round the official cantonment limits. It is also understood that no shops other than those of the said Nilcomal Mittra and Son for sale of country spirits shall exist or be opened, and that no country spirits other than their manufacture shall be permitted to be imported for sale or use within the said area. Also in consideration of Rs. 15,000 agreed to be paid annually in the manner hereinafter specified by the said Nilcomal Mittra and Son to the said Collector of Allahabad on account of the farm of pargana Chail, the said Nilcomal Mittra and Son shall have the exclusive right of manufacturing and selling country spirits after the farming system in the said pargana Chail. Also in consideration of Rs. 15,740 agreed to be paid annually in the manner hereinafter to be specified by the said Nilcomal Mittra and Son to the said Collector of Allahabad on account of the farm of the aforesaid Trans-Jumna parganas, the said Nilcomal Mittra and Son shall have the exclusive right of manufacturing and selling country spirits after the farming system in the said Trans-Jumna parganas, *viz.*, Khairagarh, Bara, and Arail, all such farms or monopolies to extend and subsist for a period of three years certain, commencing from the first day of October, 1879. (ii). That the said Nilcomal Mittra and Son of the second part shall not open or cause to be opened any shops for the purposes of the above farms other than those now open and existing, without the previous consent of the said Collector of Allahabad of the first part in writing had and obtained. (iii). That as yearly license fees for the sale of rum and country spirits within the abkâri limits of the city and cantonments of Allahabad, as above described, the aforesaid Nilcomal Mittra and Son of the second part shall pay or cause to be paid unto the Collector of Allahabad the sum of Rs. 1,200 and Rs. 3,000, respectively, in all Rs. 4,200. (iv). That besides the aforesaid license fees of Rs. 1,200 and Rs. 3,000 the said Nilcomal Mittra and Son shall pay to the Collector of Allahabad aforesaid a still-head duty on all the rum and country spirits issued to them from the distillery at

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Karailabagh at the rate of Rs. 4 per imperial gallon of rum, and Re. 1 per imperial gallon of country spirits. Provided always that for every year during the aforesaid three years no less quantity than 5,000 gallons of rum shall be drawn out by the said Nilcomal Mittra and Son, so as to yield to Government a minimum sum of Rs. 20,000 per annum on account of still-head duty on rum : and it is hereby distinctly understood by and between the parties to these presents that for no cause, such as bad seasons, dearness of material, labour, or provisions, shall the aforesaid Nilcomal Mittra and Son be excused from paying to the said Collector of Allahabad the said minimum sum of Rs. 20,000 per annum as still-head duty on rum. (v). That besides the license fees and still-head duty aforesaid the said Nilcomal Mittra and Son shall pay to the said Collector of Allahabad, during the said period of three years, the sum of Rs. 1,250 for each month, before the 15th day of the month, on account of the farm of Chail, and Rs. 1,311-10-8 for each month, before the 15th day of the month, for the farm of the Trans-Jumua parganas aforesaid, for the exclusive right of manufacture and vend of country spirits after the farming system in the aforesaid parganas Chail, Khairagarh, Bara, and Arail in the district of Allahabad aforesaid. (vi). That in the event of any breach on the part of the said Nilcomal Mittra and Son in the observation or performance of any of the conditions hereof the aforesaid Nilcomal Mittra and Son hereby bind themselves to pay the said Collector of Allahabad a penalty of Rs. 5,000."

The opinion of the Board as regards the stamp-duty chargeable on this instrument was as follows :

"The Board considers that the instrument, although it is in the form of a lease is not a 'lease' as defined in s. 3, cl. (12), of the Stamp Act. It cannot be said to lease immoveable property ; nor is it an agricultural lease known as a 'patta,' nor is it a lease of 'tolls.'

"The definition of a 'bond' as given in s. 3, cl. (4), (a), of the Stamp Act appears to cover the main provisions of the document. A bond is defined to be 'any instrument whereby a person obliges himself to pay money to another, on condition that the obligation

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shall be void if a specified act is performed, or is not performed, as the case may be.' By the instrument in question the excise contractor binds himself to pay certain sums annually to the Collector of Allahabad on condition that the obligation shall be void if a specified act be not performed, viz., if the Collector do not make over to him the monopoly of the right of vend of spirituous liquors within certain parts of the Allahabad district. The Board, however, are inclined to think that the concluding words of the definition refer to the obligor of a bond and not to the obligee, and that it is the obligor not the obligee on whom the performance or the non-performance of the 'specified act' is incumbent. If the definition be limited to this construction, it is impossible to class the instrument in question as a 'bond' with reference to its principal provisions.

"There is little doubt, however, that the penal clause in the instrument whereby the contractor binds himself to pay a penalty of Rs. 5,000 on failure to comply with the conditions of the contract is a bond for Rs. 5,000. But the Board believe that such penal clauses have been held to be auxiliary to the main provisions of the contract, and, therefore, do not relate to a 'distinct matter' in the meaning of s. 7 of the Stamp Act. If this view be correct and the instrument be held by the Court to be also a 'bond' in respect to its principal clauses, the duty will be calculated on the amount secured by the latter, and no additional duty will be leviable on account of the subsidiary bond of the penal clause. As the contractor binds himself to pay Rs. 54,940 per annum for three years, the duty will be calculated on a bond for Rs. 1,64,820, and will amount under sch. i, No. 13, of the Act, to Rs. 825.

"If, however, the main clauses of the instrument do not constitute it a 'bond', it might possibly be held to be a 'conveyance,' as defined by s. 3, cl. (9), being an instrument by which the right of vend is transferred on sale to the excise contractor. Otherwise it must be classed as an 'agreement not otherwise provided for by the Stamp Act' (sch. i, No. 5. (c) ), and as such is only liable to a duty of eight annas. In this case, however, the duty on the bond in the penal clause would exceed the duty chargeable on the instrument in respect to the principal matter treated of, and under s. 7 the higher duty of the two is leviable."

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The Board was not represented.

The following judgments were delivered by the High Court :

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STUART, C. J.—The result of the very anxious consideration I have given to this reference is a conclusion altogether different from that arrived at by my colleagues and by the Board of Revenue. A very careful examination of the Stamp Act I of 1879 has satisfied me that there is nothing in its provisions or its schedules that applies to the penalty of Rs. 5,000 agreed to be paid in the event or events therein expressed, and the legal character of that penalty must be determined solely on legal principle. I agree with the Board that the document is not a lease as defined by the Stamp Act, but a mere agreement or memorandum of an agreement, the proper stamp-duty on which is eight annas, and the several clauses and articles which constitute this agreement constitute the primary obligation undertaken by the parties, the Rs. 5,000 being a mere penalty contingent on the non-performance cannot be anticipated or presumed. On the contrary the presumption, according to all recognised legal principle, is that the contract or agreement will be performed, and that the circumstances under which this penalty may be sought to be enforced will never arise. That I say is the legal presumption applicable to this part of the case, the right to recover the penalty may or may not happen and which we are not to assume will happen. That being so, this penalty of Rs. 5,000 does not come into consideration at present as matter for stamp duty. Should the contingency provided against by this penalty occur, it will then be in the power of the Collector to recover it in a proper suit and under an appropriate court-fee. But at present we have, in my opinion, nothing to do with the penalty, what we have to do with is the true character of the instrument with which, in the manner and to the effect I have pointed out, it is incorporated.

A careful examination of the instrument, which I say is an agreement chargeable with a duty of eight annas, ought I think to lead to this conclusion. It recites that Nilcomal Mittra and Son, being desirous of obtaining from the Government the monopoly of the right of manufacture and sale of English and native spirits for

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the period of three years certain commencing from the 1st day of October, 1879, had applied to the Collector for the privilege, and that the Collector, by and with the sanction of the Board of Revenue, had agreed to grant the monopoly asked for, and in consideration of which monopoly payment shall be made of Rs. 20,000 per annum as still-head duty for 5,000 gallons of rum, and other large payments including payments for license fees are stipulated for; and then comes, as article 6 of the instrument, the condition respecting the penalty, and which is in these terms:—"In the event of any breach on the part of the said Nilcomal Mittra and Son in the observation or performance of any of the conditions hereof, the aforesaid Nilcomal Mittra and Son hereby bind themselves to pay the said Collector of Allahabad a penalty of Rs. 5,000." There can be no doubt about this penalty being a *bonâ fide* condition of the agreement on the contingency which it contemplates happening, but that it was *that* and nothing more is to my mind very evident, for the clauses that follow include this penalty as among the considerations moving the parties.

Both the Board and my colleagues describe the covenant for a penalty of Rs. 5,000 as a "bond" for that amount within the meaning of the term as given in s. 3, cl. (4), of the Stamp Act for 1879. That section provides that "unless there is something repugnant in the subject or context 'Bond' means any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be." But this definition only applies inversely to the case before us in which, besides, there is no condition of nullity or voidance, the penalty being applied, without discrimination or specification, to the entire contract and the whole of its provisions, and which are exclusively of a pecuniary character, and the violation of which could be adequately measured in damages. It is also to be observed that the penalty in an English bond can never be enforced excepting for the purpose of covering interest and costs. In the case of the penalty now under consideration, it was probably intended to be enforced, and is no doubt capable of being enforced, to cover damages as well as interest and costs, but in either case the penalty

is not such a unit or entity as that to which a precise stamp-duty can *a priori* be applied.

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From these considerations it results that the adoption of the penalty as the measure of the stamp-duty on this agreement would involve the injustice of applying it indiscriminately and without regard to the nature and extent of the breach. On this subject I find it laid down in Broom's Commentaries on the Common Law of England (1864), p. 618 :—"Where, however, parties agree that a specific sum shall be payable by way of *penalty* for breach of contract, our Courts will apply equitable principles in the assessment of damages, not indeed allowing them to exceed the sum thus stipulated, but requiring evidence to be given for the purpose of fixing their precise amount, and enabling the jury to award it accordingly." And as an illustration of the law so laid down the learned author refers to the case of *Kemble v. Farren* (1) which appears to be a much stronger case in favour of the principle that I would apply than the present. It was an action of *assumpsit* for the breach of an engagement by the defendant to perform as an actor at the plaintiff's theatre during several consecutive seasons. "This agreement," continues Mr. Broom, "contained various clauses and stipulations between the parties, *inter alia*, that the defendant should perform, and the plaintiff should pay him so much on every night that the theatre should be open for theatrical performances during the time in question, and that, if either of the parties should neglect or refuse to fulfil the said agreement or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1,000, which sum was declared to be *liquidated and ascertained damages*, and not a *penalty* or in the nature thereof. Notwithstanding, however, this expression of the intention of the parties, the Court of Common Pleas held that the amount specified was to be regarded as a *penalty merely*, and not as liquidated damages, for they observed that, if an agreement contains clauses, some sounding in uncertain damages and others relating to certain pecuniary payments, as happened in the case *sub judice*, and the action is brought for the breach of a clause of an

(1) 6 Bing. 141.

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uncertain nature, it would be absurd to construe the sum specified in the agreement as liquidated damages: because, if so, a very large sum might become immediately payable in consequence of the non-payment of a very small one, such case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of contract." The fairness of the rule so expounded is obvious, and in the present case would, if applied, prevent the injustice of the full penalty being enforced without reference to the nature and extent of the breach of contract. In the case before us the breaches might involve the violation of the whole contract, in which case the full penalty of Rs. 5,000 would be enforceable. In the present case the penalty is to be paid "in the event of any breach on the part of the said Nilcomal Mittra in the observation or performance of any of the conditions hereof." But the actual breach might be something comparatively small, and it would therefore be unjust to exact the whole penalty and not such a portion of it as in such a case might be applied.

But this is a state of things which cannot be anticipated at the commencement of a contract, and can therefore afford no measure for a present calculation of stamp-duty.

For these reasons it appears to me impossible to regard this penalty as a bond within the meaning of that term as defined by the Stamp Act I of 1879, but that it ought to be looked at simply as one of several clauses of the entire agreement, and which, should it ever come to be enforced on the equitable principle I have explained, would involve the levying of a court-fee according to the amount claimed in a suit to be brought for that purpose.

This is my answer to the reference by the Board of Revenue, and I regret it should be given in disagreement with the opinion of my colleagues.

OLDFIELD, J.—As I understand the terms of this instrument it is an instrument by the first five clauses of which it is agreed

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between the parties to it, namely, Nilcomal Mittra and Son on the one side, and the Collector of Allahabad on the other side, that in consideration of Nilcomal Mittra and Son making certain annual payments to the Collector he shall receive from the Collector the exclusive right of manufacture and sale of certain spirits within certain territorial limits for a period of three years, and conditions are specified in respect of shops to be opened for the sale of the spirits and of the instalments by which the payments are to be made : and by the sixth clause Nilcomal Mittra and Son bind themselves, in the event of any breach on their part in observation or performance of any part of the conditions of the instrument, to pay to the Collector a penalty of Rs. 5,000 : and by the eighth clause the Collector covenants, in consideration of the above conditions being duly observed by Niloomal Mittra and Son, not to take away or withhold the exclusive license to manufacture or sell spirits for three years, or to do anything whereby the performance of the conditions of the agreement by Nilcomal Mittra and Son shall become practically impossible. No part of this instrument except clause six comes within the meaning of a bond as defined in the Stamp Act. I look on the main clauses as only evidence of a contract between contracting parties in respect of the lease or sale of a right of manufacture and vend of spirits, and so far the instrument is subject to stamp-duty as an agreement under sch. i, No. 5, (c). I agree with the Board that the words in the definition of bond in the Act "on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be," refer to the obligor, and it is the obligor and not the obligee on whom the performance or non-performance of the specified act is incumbent. Clause six, however, meets the requirements of the definition of "bond," the obligors therein binding themselves to pay a penalty of Rs. 5,000 on failure by them to comply with the conditions of the contract, and the instrument will be subject to duty accordingly under the provisions of s. 7 of the Act.

PEARSON, J.—I am of the same opinion.

SPANKIE, J.—I also agree.

STRAIGHT, J.—I am of the same opinion.



1880  
May 19.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spinkie, and Mr. Justice Oldfield.*

REFERENCE BY BOARD OF REVENUE, N.-W. P., UNDER ACT I OF 1879.

*Instrument of partition—Stamp—Act I of 1879 (Stamp Act), ss. 3, cl. (11), 29, and sch. i, No. 37.*

*Held* that the words “the final order” used in the definition of an “instrument of partition” in Act I of 1879 mean, not the order authorising a partition to proceed, but the order passed after the partition has been made declaring the various allotments of land. Also that the stamp-duty chargeable under that Act on an instrument of partition is chargeable in respect of the entire property sought to be divided, and not merely in respect of that portion of it allotted to the applicant for partition. Also that for the purposes of that Act the value of the property is to be computed with reference to its market-value and not with reference to the Court Fees Act, 1870.

THIS was a reference by the Board of Revenue, North-Western Provinces, under s. 46 of Act I of 1879, the nature of which will appear from the opinion of the Board, which was in the following terms :—

“The new Stamp Act requires that partitions effected by the Revenue Courts shall be liable to stamp duty, and cl. (11) of s. 3 defines an ‘instrument of partition’ as ‘the final order for effecting a partition passed by any Revenue Authority’. The question has been raised whether this ‘final order’ is the order passed by a Revenue Court authorising a partition to proceed, or the order passed after the partition has been made declaring the various allotments of land. The Board think that the latter is unquestionably ‘the final order’ referred to. The import of this order is defined in the 21st rule of the Board’s rules for partitions (Circular No.  $\frac{8}{11-34}$ , dated the 13th November, 1875, page 63, Part II of Board’s Circulars (1).

“The question is also raised as to the extent of the property specified in the instrument of partition. Sch. i, No. 37, directs that the duty on an instrument of partition shall be ‘the same duty as a bond for the amount of the value of the property divided as set forth in such instrument.’ The instrument of partition sets forth that out of such property previously undivided a certain portion is assigned to the applicant for partition. Is the entire property to be valued for the purposes of the Stamp Act, or merely the portion assigned to the applicant for partition? The Board

(1) See p. 663.

think that the stamp-duty should be computed on the whole of the undivided property which the parties seek to divide, and which is mentioned for this purpose in the partition instrument.

“There remains the further point as to how the *value* of the property is to be computed, as it has been thought that the method of valuation laid down by cl. v. of s. 7 of the Court Fees Act for the case of land should be followed. The Board consider that the provisions of the Court Fees Act cannot apply to valuations of stamp-duty under the General Stamp Act. The value of property for the purposes of the latter Act is the market-value, *i.e.*, what the property would fetch if sold, and this must be ascertained by the Court issuing the final orders in the partition proceeding.”

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The Board was not represented.

The following judgments were delivered by the High Court:

STUART, O. J.—I concur in the view taken by the Board of Revenue on all the questions submitted to us by this reference. I would point out, however, that it is scarcely correct to describe an instrument of partition as “the final order for effecting a partition passed by any Revenue Authority.” By s. 3, cl. (11), an instrument of partition is defined to be “any instrument whereby co-owners of any property divide or agree to divide such property severally, and *includes also* a final order for effecting a partition passed by any Revenue Authority.” So that there must be in the first place the recorded act of partition or division by the co-owners or their agreement or contract to make it, and the “final order” which follows is simply the *fiat* of the Revenue Authority sanctioning the partition by means of which the partition becomes a completed act, and there can of course be no effectual partition until this is done. And such must also be taken to be the meaning of s. 131 of the Revenue Act XIX of 1873, which provides that “every partition shall either be made by the Collector of the District, or, if made by an Assistant Collector, be reported to the Collector of the District for his sanction and confirmation,” a provision which, if taken by itself, without reference or relation to any other enactment, would seem to signify that partition of property rested exclu-

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sively on the independent action of the Collector without any necessary regard to the views or purposes of the co-owners.

As to the question submitted to us in the third paragraph of the Board's letter, I am clear that the Board is right in suggesting that the stamp-duty should be computed on the *whole* of the undivided property which the parties seek to divide, and in my opinion no matter how far or within what limits that division may be carried out. Our attention was directed to s 29 of the new Stamp Act, which provides that the stamp-duty on an instrument of partition shall be payable "by the parties thereto in proportion to their respective shares in the property comprised therein," and it was argued that the portion of property divided off to the particular co-sharer or co-sharers who apply for partition should only be chargeable with stamp-duty corresponding in value to the particular share or shares partitioned. But this view of s. 29 appears to me to be based upon too narrow a construction of its terms. That section does not say that the stamp-duty shall only be payable on the share or shares partitioned off, but on the contrary declares that the expense of providing the proper stamp shall be borne by the parties thereto in proportion to their respective shares in the property comprised in the instrument of partition. By the expression "the parties thereto" must be understood not merely the party or parties applying for partition, but the whole co-sharers who must necessarily be parties in the partition proceedings and equally bear the proper stamp-duty. For the effect of the partition proceedings is that the property thereby loses its identity as a previously undivided mahál, and there is nothing unreasonable in making any instrument of partition, it matters not how limited the division may be, chargeable with stamp-duty pertaining to the value of the whole.

In further support of this view the stamp-duty chargeable on an instrument of partition as given in No. 37, sch. i of the new Stamp Act was referred to. The duty is there declared to be "the same duty as a bond (No. 13) for the amount of the value of the *property divided* as set forth in such instrument." Here the words "the value of the property divided" must as I have shewn mean

the value of the entire property affected by the partition proceedings. And on turning to No. 13 of the same schedule the stamp duty of two annas and upwards according to the value is distinctly set out.

In regard to the last question referred to us, I am clearly of opinion in concurrence with the Board that the value of the property to be computed is the market-value, and that the Court Fees Act has no application to such a question.

PEARSON, J.—The first question proposed for our consideration is whether the order passed by a Revenue Court authorising a partition to proceed, or the order passed after the partition has been made declaring the various allotments of land, is the final order for effecting a partition spoken of in cl. (11), s. 3, Act I of 1879. An order authorising a partition to proceed is in some sense an order for effecting a partition, but the order which declares the various allotments of the land is in my opinion the final order which effects the partition.

The next question is the extent of the property specified in the instrument of partition. That instrument sets forth that of such and such property previously undivided a certain portion is assigned to A the applicant for partition. We are asked whether the entire property is to be valued for the purposes of the Stamp Act or merely the portion assigned to the applicant for partition. In my opinion the entire property has been the subject-matter of partition, and the stamp-duty required by No. 37, sch. i, Act I of 1879, should be calculated upon its value and not merely on the value of the portion assigned to the applicant for partition. The portion assigned to the applicant could only be separated and allotted to him in severalty by a process which dealt with the entire property and separated and allotted the remainder of it to another party. The opinion now expressed appears to be supported by the terms of cl. e, s. 29 of the Act, which provide that the stamp-duty shall be payable in the case of an instrument of partition, not by the applicant for partition, but by the parties thereto,—and the other co-sharers in the entire undivided property must be parties to the partition of it equally with the applicant for partition—in

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proportion to their respective shares in the property comprised therein, and it cannot be denied that the partition comprises the entire undivided property.

The last question is how the value of the property is to be computed, whether in reference to its actual value in the market, or to the rules laid down in the Court Fees Act for determining the fee payable on plaints and appeals. The Court Fees Act has no relevance to the present matter, and in my opinion the market value of the property, the subject-matter of partition, should furnish the basis for calculating the stamp-duty required by No. 37, sch. i, Act I of 1879.

Thus on the questions referred by the Board of Revenue, I have arrived at the same conclusion as the Board has formed.

SPANKIE, J.—Looking at the first question, the “final order for effecting a partition passed by any Revenue Authority” appears to be that which would be made under s. 131, Act XIX of 1873. I find no place in the Act for the agreement referred to in the 21st paragraph (1) of the Board’s Circular. The notification published by the Collector under s. 131 of the Act would probably contain all the particulars referred in the Board’s letter.

As to the second question, looking at the definition of “instrument of partition” in cl. (11), s. 3 of Act I of 1879, it would seem that it is “any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also the final order for effecting a partition by any Revenue Authority”. By s. 29 of the Act, in the absence of an agreement to the contrary, in the case of an instrument of partition, the expense of providing the proper stamp is to be borne by the parties thereto in proportion to their respective shares in the property comprised therein, or when the partition is made in execution of an order passed by the Revenue Authority in such proportion as such Authority directs. The property comprised in the instrument of partition

(1) Rule 21.—“If all agree to the proposals or to such amended proposals as the Collector may think fit to make, their agreement shall be recorded and attested by the Collector. If any ob-

jections are raised, the Collector shall hear them and record an order overruling them, or amending the proposals to meet them as he thinks fit.”

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has to be valued, and the parties thereto contribute towards the expense of the stamp in proportion to their shares in the property. If a stamp of one hundred rupees was required, and the property was worth ten thousand rupees, and five share-holders, being co-owners, *divided or agreed* to divide in severalty, the proportionate value of their shares would be two thousand rupees each, and each one would pay the duty on two thousand rupees, unless there was an agreement to the contrary, or where a Revenue Authority had directed otherwise in a partition made under his orders. The last part of cl. 2, s. 29 of the Act, gives the revenue officer full authority in the matter and the "final order" is the instrument of partition.

As to the third question the value is doubtless the market value.

OLDFIELD, J.—I agree with the Board of Revenue that the order which declares the various allotments of the land requires the stamp. The stamp should be paid on the value of the whole property which by the instrument of partition the co-owners are dividing or agreeing to divide; so far as I understand this is the view taken by the Board.

I also agree with the Board that the stamp should be computed on the market-value of the property.

## APPELLATE CIVIL.

1880  
February 5.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

**FARZAND ALI (DEFENDANT) v. YUSUF ALI AND OTHERS (PLAINTIFFS).\***

*Plaint, amendment of—Remand by Appellate Court—Act X of 1877 (Civil Procedure Code), ss. 53, 562.*

By the amendment of the plaint, a suit for the restoration of a pond, which it was alleged the defendants were wrongfully filling up, to its original condition, was altered into one for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and the use of the water, by way of easement. *Held* that the alteration in the plaint was a material one.

\* First Appeal, No. 125 of 1879, from an order of H. G. Keene, Esq., Judge of Meerut, dated the 7th August, 1879, reversing a decree of Maulvi Azmat Ali Khan, Munsif of Bulandshahr, dated the 5th June, 1879.

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*Held also that an appellate Court is not empowered by Act X of 1877 to order or allow a plaint to be amended, or to remand a case under s. 562 of that Act, for the purpose of such amendment.*

THE facts of this case appear sufficiently for the purposes of this report in the judgment of the High Court.

Pandit *Nand Lal* and *Shah Asad Ali*, for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.) was delivered by

PEARSON, J.—We regret to be obliged to interfere in a case which appears to have been unduly protracted by irregular procedure, but we cannot refuse to admit the validity in the main of the grounds of appeal.

The case after being originally tried by the Munsif appears to have been remanded to him by the Officiating Judge in appeal in contravention of the terms of s. 564, Act X of 1877. The second decision of the Court of first instance was again the subject of an appeal which terminated in a second order of remand in contravention of the section aforesaid. The Munsif's third decision was also appealed; and the Judge in disposing of the third appeal has once more remanded the case for retrial in contravention of the same section, with a direction to cause the plaint to be amended. The present appeal is the seventh stage which the proceedings have reached.

The claim as brought was for the restoration of a pond, which it was alleged that the defendants were wrongfully filling up, to its original condition. By the proposed amendment, if we rightly understand, the claim will be for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and the use of the water by way of easement. The alteration is certainly a material one.

We observe that s. 53 of Act X of 1877 provides for the amendment of a plaint at or before the hearing of a suit in the Court of first instance at the discretion of that Court, but we do

not find any provision in the law empowering an Appellate Court to order or allow a plaint to be amended, or to remand a case under s. 562, for the purpose of such amendment. That section contemplates a case in which the decree of the first Court upon a preliminary point has been reversed in appeal. In the present case it does not appear that the decree of the Court of first instance proceeded upon a preliminary point and has in respect thereof been reversed.

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We have therefore no alternative but to set aside the lower Court's order of remand and to direct it to dispose of the appeal afresh in reference to the claim as brought. The costs of this appeal will be costs in the cause.

*Cause remanded.*

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## CIVIL JURISDICTION.

1880

February 27.

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*Before Mr. Justice Spankie and Mr. Justice Straight.*

**BADR-UN-NISA (PLAINTIFF) v. MUHAMMAD JAN AND ANOTHER  
(DEFENDANTS).\***

*Small Cause Court Suit—Implied contract—Mistake—Damages—Act XI of 1865, s. 6—Act IX of 1872 (Contract Act), s. 72—Act X of 1877 (Civil Procedure Code), ss. 50, 53—Plaint, amendment of*

A suit under s. 72 of the Indian Contract Act to recover from a creditor the amount of an over-payment made to him by mistake is a suit for damages, within the meaning of Act XI of 1865, s. 6, and is accordingly cognizable by a Mufassal Court of Small Causes.

*Seemle* that, where at the first hearing of a suit the plaint is returned for amendment within a fixed time under the provisions of s. 53 of Act X of 1877, and it is amended accordingly, it cannot afterwards be again returned for amendment.

THIS was a reference to the High Court by Mr. G. E. Knox, Judge of the Court of Small Causes at Allahabad.

The facts out of which the reference arose were as follows : On the 11th September, 1876, Badr-un-nisa, the plaintiff, executed a bond in favour of the defendant Muhammad Jan promising to pay him Rs. 200 with interest at two per cent. per mensem within three years. On the 3rd October, 1879, she instituted the present



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suit in the Court of Small Causes at Allahabad against the defendant Muhammad Jan and the defendant Abdul Ghani, stating in her plaint as follows:—“(i) That she had paid the defendant Muhammad Jan, on the 20th June, 1878, at Allahabad, at his request, Rs. 299, on account of the bond dated the 11th September, 1876: (ii) that the sum due on account of the said bond was only Rs. 292-9-0: (iii) that the defendant Muhammad Jan had taken Rs. 6-7-0 more than was due from her: and (iv) that on the 1st April, 1877, she paid to the defendant Abdul Ghani Rs. 9 on account of the said bond as directed by the defendant Muhammad Jan, and for which he did not allow any deduction.” She sought in consequence that “(i) Rs. 6-7-0 which the defendant Muhammad Jan had received in excess on the 20th June, 1878, together with interest at two per cent. per mensem from the 21st June, 1878, to the 1st October, 1879, might be awarded to her: (ii) that Rs. 9 paid to the defendant Abdul Ghani at the request of the defendant Muhammad Jan together with Rs. 3-3-0, interest from the 1st April, 1877, to 1st October, 1879, might be awarded to her: (iii) that Rs. 20-8-0, principal and interest might be awarded in all.” The plaint having been returned to her for amendment in respect of the relief sought, the plaintiff amended it by asking that a decree might be passed in her favour for Rs. 15-7-0, principal, and Rs. 5-1-0, interest at twenty-four per cent. per annum, in all Rs. 20-8-0.

The Judge of the Small Cause Court, in referring the case, observed as follows:—“She (plaintiff) now sues for the refund of Rs. 15-7-0 excess paid by mistake and Rs. 5 interest upon that excess: and has framed her plaint as a plaint for money due upon a contract: I held that there is no contract whatever in the case, that the relation of the parties (plaintiff and defendant No. 1) is that of one having paid money to the other through mistake. Such a relation subsists, as pointed out by Sir Barnes Peacock in the Full Bench ruling in *Rumbuz Chittangeo v. Modhoosoodun Paul Chowdhry*, (1), upon a *quasi* contract; and a *quasi* contract is no contract at all. The Indian Contract Act provides for these cases in s. 70, and by so doing seems to suggest that it recognises to the full the principle that they do not arise from any

(1) 7 W. R., 377.

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contract (see the heading of chapter V within which s. 70 falls). I further held that the words which grant jurisdiction to this Court, 'money due on bond or other contract,' cannot be enlarged to include money due on relations resembling those created by contract.

"The pleader for the plaintiff urges on the other hand that the obligation in this case rests upon an implied contract and that the claim is therefore cognizable.

"At the same time he contends that, if over-ruled in this point, he may be allowed to amend his plaint into one for damages or compensation, in which case, following the ruling of the Hon'ble Court in *Agra Savings Bank v. Sri Ram Mitter* (1), his suit would be cognizable by this Court.

"Defendant, however, objects that such amendment would alter the plaint into one of another and inconsistent character, and it seems to me his contention is right.

"In the original plaint he would be suing upon a contract, in the amended plaint upon the breach of a contract. The distinction between a contract and breach of a contract as causes of action seems to me to fall under the words 'another and inconsistent'.

"On this point I am, however, doubtful, and I have therefore determined upon referring both points for decision."

The questions referred by the Judge for the decision of the High Court were as follows: "(1) Are cases falling under s. 70, Act IX of 1872, cognizable by a Court of Small Causes? (ii) Can a plaintiff amend a plaint for money due upon an implied contract into a plaint for damages arising out of breach of an implied contract?"

The parties did not appear.

The judgment of the High Court (SPANKIE J., and STRAIGHT, J.,) was delivered by

STRAIGHT, J.—This is a reference under s. 617 of Act X of 1877 by the Judge of the Small Cause Court, Allahabad, in

(1) I. L. R., 1 All., 388.

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respect of certain questions of law that have arisen in a case before him, in which one Badr-un-nisa is the plaintiff and Muhammad Jan and Abdul Ghani are the defendants. It appears that the plaintiff was the obligor of a bond for Rs. 200 of which defendant No. 1 was the obligee. On the 1st April, 1877, at the request of defendant No. 1, she paid to defendant No. 2 the sum of Rs. 9, on the understanding that it was to be credited to her in the amount due from her on the bond. On the 20th June, 1878, the plaintiff, upon his demand, paid to defendant No. 1, Rs. 299 in satisfaction of her debt to him. It now appears that she has paid over and above what was actually due from her Rs. 15-7-0 and it is this amount she seeks to recover.

The questions properly arising on the Judge's reference appear to be,—(i) Does the plaintiff's claim fall within the terms of s. 72 of the Contract Act? (ii) If it does, can the plaint as filed be altered from its present shape to meet the case, without contravening the directions of the proviso of s. 53, Act X of 1877? (iii) If not, does the plaint upon its face sufficiently disclose what the suit is for, so as to enable the Judge to treat it as one for damages without doing the defendant injustice or taking him by surprise?

It appears to me that the circumstance of the Rs. 9 having been paid to defendant No. 2 in no way affects the nature of the plaintiff's claim. She ought to have been credited in account with that sum by defendant No. 1, but she was not, and consequently, when she satisfied his demand of Rs. 299 on the 20th June, 1878, and paid Rs. 15-7-0 too much, her cause of action arose. The suit falls directly within s. 72 of the Contract Act, and, the plaintiff having paid this money by mistake and the defendant having refused to repay it when requested to do so, the plaintiff is entitled to recover it from him.

As to the second point the plaint as originally framed no doubt treated the plaintiff's claim as based upon a *quasi* contract. According to English precedents, suits for the recovery of money paid by mistake are founded upon the fiction of an implied contract and promise to pay. But the provisions of the Contract Act, chapter V, have superseded this fiction of implied contract and promise, and

the repayment of money by a person to whom it has been paid in mistake is by s. 72 declared to be a duty on the part of such person, the refusal to perform which, when requested, is proper ground of an action for damages. The suit of the plaintiff in the present case therefore is for damages against defendant No. 1 and defendant No. 2 can in no way be a party. The plaint was originally filed on the 3rd October, 1879, and was returned for amendment within twenty-four hours on the 19th October. It was amended within the time limited by the Court and re-filed in its present shape.

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I have considerable doubt as to whether it is competent now for further amendment of the plaint to be made, if it be necessary. According to the terms of s. 53, Act X of 1877, it was returned for amendment "at the first hearing", and was amended within the "time fixed by the Court." I am disposed to think that it is now too late for any further alterations in its shape to be made, but as the view I entertain upon the third point obviates the necessity for any amendment, it is unnecessary to express any determinate opinion as to this. It appears to me that the plaint in its present shape, although it may be inartistically framed, indicates sufficiently what the suit is for. It shows clearly on its face that a sum of Rs. 15-7-0 is demanded by the plaintiff of the defendant, and, as the application of the Contract Act determines the cause of action and the precise nature of the relief to be asked under a state of facts such as exists in the present case, I think, without infringing the provisions of ss 50 and 53 of Act X, the Judge may take cognizance of the plaint as one for damages and dispose of the case under s. 6, Act XI of 1865.

As I have already remarked, defendant No. 2 must be struck off, and he will of course be entitled to his costs.

SPANKIE, J.—I concur.

1880  
May 3.

## FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spinkie, Mr. Justice Oldfield, and Mr. Justice Straight.*

**MUL CHAND (PLAINTIFF) v. SHIB CHARAN LAL AND OTHERS (DEPENDANTS).\***

*Act VII of 1870 (Court Fees' Act), s. 17 - Act VIII of 1859 (Civil Procedure Code), s. 9 - Act X of 1877 (Civil Procedure Code), ss. 44, 45—Multifarious suit—"Distinct Subjects"—Plaint—Memorandum of Appeal.*

*Held that the words "distinct subjects" in s. 17 of the Court Fees' Act, 1870, mean distinct and separate causes of action. Uhamaili Rani v. Ram Dai (1) observed on.*

The plaintiff sued his brothers and a nephew for his share, according to the Hindu Law of inheritance, and under a will, of the moveable and immoveable property of his deceased uncle, by the cancellation of a deed of gift of the immoveable property in favour of the nephew. *Held per STUART, C. J., and STRAIGHT, J.*, that, under s. 17 of the Court Fees' Act, 1870, the plaint and memorandum of appeal in the suit were chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in separate suits for the moveable and immoveable property would have been liable under that Act.

\* *Per OLDFIELD, J.*,—That court-fees were leviable on the plaint and memorandum of appeal on the total value of the claim, the suit not being one of the nature to which s. 17 of the Court Fees' Act referred.

THIS was a reference to the Full Bench arising out of the following circumstances. The plaintiff in this suit sued his six brothers and Shib Charan Lal, the son of one of his brothers, for the possession of his share, under the Hindu law of inheritance as well as under a will dated the 12th October, 1876, of the separate estate of his deceased uncle. The plaint stated that the property described therein formed the separate estate of Salig Ram; that Salig Ram made a will in favour of the defendant Shib Charan Lal on the 29th September, 1874, in which he reserved to himself power to revoke the will in case the defendant Shib Charan Lal disobeyed him or misconducted himself; that subsequently the defendant Shib Charan Lal disobeyed the testator and misconducted himself, upon which the testator, having revoked the will of the 29th September, 1874, made a will in favour of the plaintiff and his brothers on the

\* First Appeal, No. 15 of 1879, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 11th November, 1878.

(1) I. L. R., 1 All. 552.

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12th October, 1876, in respect of his whole estate, in which he did not reserve to himself any power of revocation, and under which the plaintiff and his brothers were holding possession of a portion of the testator's estate without any opposition on the part of the defendant Shib Charan Lal; that on the death of Salig Ram, which occurred on the 30th July, 1877, the defendant Shib Charan Lal took possession of the greater part of his estate, under cover of a deed of gift alleged to have been executed in his favour by the deceased on the 13th February, 1877; that the said deed of gift was invalid by reason that it had been executed by the donor while he was in an unsound state of mind, that it had not operated, and that the donor was precluded by the will dated the 12th October, 1876, from alienating his estate; that the cause of action arose on the 30th July, 1877, when Salig Ram died and the defendant Shib Charan Lal obtained possession of his estate; that the plaintiff was entitled to a one-seventh share of Salig Ram's estate according to the Hindu Law of inheritance as well as under the will dated the 12th October, 1876; that the defendant Shib Charan Lal had no right whatever in the presence of the plaintiff, according to Hindu Law, nor could the deed of gift be considered valid as against the will in the plaintiff's favour; and that the plaintiff's brothers had been made defendants *pro forma* in the suit, as they did not join in it. The plaintiff claimed the following relief: "The plaintiff therefore prays for possession of the disputed property, valued at Rs 2,698-11-9½, by voidance of the deed of gift set up by the defendant, and for the value of the moveable property in case it cannot be recovered, and mesne profits to the date of receiving possession from the defendant Shib Charan Lal."

The property of which the plaintiff claimed a one seventh share consisted of (i) land forming estates and definite shares of estates paying annual revenue, settled, but not permanently, to Government; (ii) gardens and indigo factories; (iii) house-property; (iv) decrees and deeds of mortgage; and (v) moveable property. The deed of gift which it was sought to set aside transferred a portion of this land and the whole of the house-property to the defendant Shib Charan Lal, but did not transfer to him the gardens and indigo factories, or decrees and deeds of mortgage, or the

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moveable property, or any part of such properties. The plaintiff valued a one-seventh share of the land in suit at one-seventh of five times the revenue payable in respect of the land, or Rs. 1,269 11-0. The one-seventh shares of the other properties he valued at their market-values, or at, respectively, Rs. 96-6-10½, Rs. 300-0-0, Rs. 4-5-6-10½, and Rs. 627-3-1½. He paid in respect of his plaint an *ad valorem* court-fee of Rs. 160 computed on the aggregate of these values, viz., Rs. 2,698-11-9½. On appeal to the High Court from the decree of the Court of first instance dismissing his suit, the plaintiff paid a similar court-fee in respect of his memorandum of appeal. The taxing officer of the High Court reported that the plaint and memorandum of appeal were insufficiently stamped. The report stated as follows :—"The plaintiff claimed to recover possession of certain immoveable properties, valued at Rs. 1,666-1-10½, as also to recover certain documents and other moveable properties valued at Rs. 1,032-9-11 : total claim laid at Rs. 2,698-11-9½. The court-fee payable on the two distinct subjects embraced in the suit and the appeal would amount to Rs. 190, i. e., Rs. 110 for the claim relating to the immoveable properties, and Rs. 80 for the claim relating to documents and other moveable properties, but the plaintiff-appellant has paid only Rs. 160 in both the Courts. There is then a deficiency of Rs. 30 in each or Rs. 60 in both the Courts."

The Division Bench (STUART. C. J., and STRAIGHT, J.) before which the appeal came referred the matter to the Full Bench.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Munshi Hanuman Prasad, for the appellant,

Mr. Conlan and Pandit Ajudhia Nath, for the respondents.

The following judgments were delivered by the Full Bench :

STUART, C. J.—This is a reference to the Full Bench of the Court by Straight, J., and myself respecting a deficiency of court fees reported to us by the Office. The question was raised in a first appeal (No. 15 of 1879) which came before us as a Division Bench, and the report of the Office stated that the plaintiff claimed

to recover possession of certain immoveable properties valued at Rs. 1,666-1-10½, and also to recover certain documents and other moveable properties valued at Rs. 1,032-9-11, the total claim being laid at Rs. 2,698-11-9½. The report suggested that there were here two distinct subjects embraced in the suit, and that the court fees in the appeal should be Rs. 190, i.e., Rs. 110 for the claim relating to immoveable property, and Rs. 80 for the claim relating to documents and other moveables. But the plaintiff-appellant had only paid Rs. 160 in the lower Court and this Court, the deficiency being Rs. 30 in each or Rs. 60 in both Courts.

The question thus raised has been before a Full Bench in the case of *Chamaili Rani v. Ram Dai* (1), but as the law did not appear to us so distinctly laid down in the opinions of some of the Judges in that case as was desirable, it appeared to us that it would be satisfactory that the question should be reconsidered by the Court, and we therefore referred the matter to the present Full Bench.

On the general question of the construction to be applied to the case, I am not aware that I can express myself more clearly than I did in my judgment in *Chamaili Rani v. Ram Dai* (1). I there stated that "the meaning of the words 'distinct subjects' in s. 17 of Act VII of 1870 is shown with sufficient clearness in that section itself, when it states that 'the plaint or memorandum of appeal shall be chargeable with the *aggregate amount* of the fees to which the *plaints or memoranda of appeal in suits embracing separately each of such subjects* would be liable under the Act'. This I think can only mean that the two or more distinct subjects are to be so chargeable as being distinct causes of action. The words '*plaints or memoranda of appeals in suits*' in the section show this to my mind conclusively, and it is not enough that the distinct subjects should be merely separate and distinct matters embraced in the claim:" and I remain entirely of the same opinion. This s. 17 plainly relates to multifarious suits which are allowable by s. 45 of the Code of Procedure, Act X of 1877, a circumstance which appears to me to supply us at once with the principle by means

(1) I. L. R., 1 All 552.

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of which we may solve the difficulty, showing that "distinct subjects" must for the purpose of the Court Fees' Act be distinct and separate claims or causes of action in single and separate suits, but which for the purpose of jurisdiction, or the convenience of the procedure, may be united in one suit. And this is shown still more clearly in s. 17 itself, where "distinct subjects" are described as distinct subjects "in *suits* embracing *separately* each of *such* subjects," in other words, as I understand this section, even if we had not the light thrown upon the point by s. 9 of the old and by s. 45 of the new Code of Procedure, distinct and separate causes of action in distinct and separate suits.

In regard to the present case I am of opinion that the report of the Office is right. The plaint clearly claims, first, possession of the disputed property by voidance of the deed of gift, and, secondly, to recover certain moveable property or the price or value thereof. These are plainly two distinct subjects of suit or causes of action, and they must be separately considered with reference to the court fees to be charged on each. I would, therefore, make an order in conformity with the report of the Office.

STRAIGHT, J.—I entirely agree in the views and conclusions of the Chief Justice.

SPANKIE, J.—If there was any vagueness in the opinion expressed by me, when the subject of this reference was last before the Court, I desire to explain my meaning, and I hope more successfully on the present occasion, as follows. It was admitted at the hearing, and indeed, looking at the marginal note to s. 17 of the Court Fees' Act, it could not be denied, that the section refers to multifarious suits. The wording of s. 17 of the Court Fees' Act, "Where a suit embraces two or more distinct subjects," may be read with s. 45, Act X of 1877, which runs as follows—"Subject to the rules contained in s. 44 the plaintiff may unite in the same suit several causes of action, and any plaintiffs having causes of action against the same defendants may unite such causes of action in the same suit." Such a suit would embrace two or more distinct subjects. The second paragraph of this section corresponds with s. 9, Act VIII

of 1859, referred to in the second paragraph of s. 17 of the Court Fees' Act. The third paragraph of s. 45 provides that, "When causes of action are united, the jurisdiction of the Court as regards the *suit* shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit." This provision is of course made with a view to determine the jurisdiction of the Court to entertain the suit. But it is noticeable that "causes of action" and "subject-matters" are clearly distinguished in this section. I would, therefore, say regarding the two or more "distinct subjects of a suit", that they are the "subject-matters of a suit" in which several "causes of action" have been united, under the provisions of s. 45 subject to the rules contained in s. 44 of Act X of 1877, and, therefore, in such a suit the plaint or memorandum of appeal is chargeable with the aggregate amount of the fees to which each plaint or memorandum of appeal would be chargeable under the Act. The words, be it observed, are "would be liable", not "is liable", under the Act. There must, therefore, be several causes of action, and these several causes of action must be united in the same suit, and the subject-matters, "or two or more distinct subjects," of each cause of action united in the same suit, must be charged, as if each cause had not been so united in the same suit, but had been taken into Court by a separate plaint or memorandum of appeal.

OLDFIELD, J.—The words "multifarious suits" in the margin of s. 17, Court Fees' Act, and the reference in the last part of the section to s. 9, Act VIII of 1859, with which part of s. 45, Act X of 1877, corresponds, sufficiently show, in my opinion, that s. 17, Court Fees' Act, has reference to a suit which embraces two or more distinct subjects under separate causes of action, which might or ought to have been made subject of separate suits, in fact, when the suit is multifarious and the nature of those referred to in s. 9, Act VIII of 1859, and s. 45, Act X of 1877.

In this view, I am of opinion that the court-fee should be levied in the suit before us, which is not of the nature of those to which s. 17 refers, on the total value of the claim, i. e., Rs. 2,698-11-9½.

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February 2.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oliffeld, and Mr. Justice Straight.*

**CHEDI LAL AND ANOTHER (PLAINTIFFS) v. KIRATH CHAND AND OTHERS (DEFENDANTS).\***

*Act VII of 1870 (Court Fees' Act), s. 7, clauses i and ii., s. 12, cl. ii., and ss. 17, 28—Act X of 1877 (Civil Procedure Code), ss. 44, 45—Multifarious suit—"Distinct subjects"—Plaint—Memorandum of appeal—Suit for money—Power of the High Court to levy court-fees on improperly stamped document.*

The plaintiffs sued in virtue of a conditional sale which had been foreclosed\* for (i.) possession of a house, (ii.) compensation, in the nature of rent, for its use and occupation from the date of foreclosure to the date of suit, and (iii.) like compensation from the latter date to the date on which possession of the house should be delivered to them, the defendants having purchased the house subsequently to the conditional sale but before the same was foreclosed. The plaintiffs stated that their cause of action arose on the date of foreclosure.

*Held (SPANKIE, J. dissenting) that the suit embraced "distinct subjects" within the meaning of s. 17 of the Court Fees' Act, 1870, and the plaint and memorandum of appeal were chargeable with the aggregate amount of fees to which the plaints or memoranda of appeal in separate suits for the different claims would have been liable.*

*Held also that, if a document which ought to bear a stamp under the Court Fees' Act has been used in the High Court, and the mistake or inadvertence which permitted its reception in a lower Court, without being properly stamped, comes to light in the High Court, any Judge of that Court may, under s. 28 of the Court Fees' Act, direct that it should be properly stamped.*

*Per SPANKIE, J.*—That cl. ii, s. 7 of the Court Fees' Act, did not apply to the third claim, nor was it one for money within the meaning of cl. i. of that section, but one for which s. 11 of that Act provided.

*Per OLDFIELD, J.*—That court-fees were leviable in respect of the third claim, with reference to cl. i, s. 7, and s. 11 of the Court Fees' Act.

THIS was a case which came before the Full Bench under the following circumstances:—The plaintiffs in this suit alleged that the conditional mortgage of a certain house made in their favour in 1872 had been foreclosed on the 19th May, 1875: that notwithstanding this the defendants, who had purchased the house in 1873 in the execution of a decree for money, had refused to surrender the possession of the house: and they claimed (i) possession of the

\* Second Appeal, No. 150 of 1879, from a decree of C. Daniell, Esq., Judge of Gorakhpur, dated the 22nd November, 1878, reversing a decree of Maulvi Ahmed-ullah, Munsif of Gorakhpur, dated the 13th September, 1878.

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house, valued at Rs. 275 ; (ii) Rs. 72 being compensation in the nature of rent for the use and occupation of the house from the 19th May, 1875, the date of foreclosure, to the institution of the suit, at the rate of two rupees per mensem ; and (iii) similar compensation for the "future" from the institution of the suit to the date on which possession of the house should be delivered to them. They stated that their cause of action arose on the 19th May, 1875, the date of foreclosure. They paid on their plaint a court-fee of Rs. 26-4-0. On appeal from the decree of the Court of first instance awarding the plaintiffs possession of the house and "future" compensation, the defendants paid on their memorandum of appeal a court-fee of Rs. 26. On appeal by the plaintiffs to the High Court from the decree of the lower appellate Court dismissing their suit, the taxing-officer of the High Court reported that deficient court-fees had been paid both on the plaint and the memorandum of appeal in the lower appellate Court. That officer stated that the proper fee payable on the plaint was Rs. 41-10-0, and on the memorandum of appeal Rs. 39, computed as follows :—

		Rs.	a.	p.
(i) Claim for possession ...	...	21	0	0
(ii) Ditto for house-rent ...	...	5	10	0
(iii) Future rent at Rs. 2 per mensem under s. 7, cl. ii., Court Fees' Act		18	0	0
	Total ...	44	10	0
(i) Claim for possession ...	...	21	0	0
(ii) Future rent at Rs. 2 per mensem under s. 7, cl. ii., Court Fees' Act,		18	0	0
	Total ...	39	0	0

In consequence of this report the case came before the Full Bench together with that of *Mul Chand v. Shib Chiran Lal* (1), with the report of which it should be read.

Pandit *Bishambhar Nath*, Munshi *Sukh Ram*, and Maulvi *Mehdi Hasan*, for the appellants.

(1) See ante p. 676.

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The *Senior Government Pleader* (Lala Juala Prasad) and the *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the respondents.

The following judgments were delivered by the Full Bench :

STUART, C. J.—This case also came before us on the report of the Office. It appears that there is no deficiency of court-fees in this Court, but that there is a deficiency to the extent of Rs. 18-6-0 on the part of the plaintiff in the Munsif's Court, and of Rs. 12-12-0 on the part of the defendant in the lower appellate Court.

Pandit Bishambhar Nath for the appellants objected that this Court had no jurisdiction at this stage to entertain the question relating to the deficiency of court-fees reported by the Office, but I am clearly of opinion that s. 28 of the Court Fees' Act gives us full power for that purpose.

On the merits of the question respecting the court-fees to be charged, this case falls within the principle of the decision we have given on the same legal question in First Appeal No. 15 of 1879 (1). According to the principle recognized in that case the report of the Office in this case is clearly right, and the additional court-fees to be paid by both parties is ordered accordingly.

STRAIGHT, J.—I agree in the views and conclusions of the Chief Justice.

SPANKIE, J.—The learned Pandit Bishambhar Nath appears to question the power of this Court to decide that a document found in the record of a case sent up in appeal or on reference, as for revision, to this Court should be properly stamped. With reference to fees in other Courts than the High Courts and Presidency Small Cause Courts, the pleader argues that our power of interference is limited by s. 12, cl. ii, of the Court Fees' Act. But I would claim full power for the Court's interference, quite outside chapters II and III of the Act. S. 28 provides that no document which ought to bear a stamp under the Act shall be of any validity, until it has been properly stamped. The section deals with the case in which a document through mistake or inadvertence has been received, filed or used in any Court, without being properly stamped. Such a document may be returned at the outset by the presiding Judge of the

(1) See ante p. 676.

Court in which it has been so received or filed or used, or if the document has been received, filed or used in a High Court, any Judge of that Court, may, if he thinks fit, order that such document may be stamped as he may direct. But the section does not say that the High Court Judge can interfere only when this document has actually been filed in his Court. If the document has been used in the High Court, and the original mistake or inadvertence which permitted its reception in a lower Court, without being properly stamped, comes to light in the High Court, any Judge of that Court may direct that it should be properly stamped, always having regard to the fact that it must be a document chargeable under the Court Fees' Act. This construction appears to be quite reasonable and consistent with the concluding provision of the section, "and on such document being stamped accordingly the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance." In fact, when the insufficiency of the stamp has been detected and when a proper order has been made and carried out, the original mistake or inadvertence and all subsequent consequences of such mistake or inadvertence are cured.

On the other question my opinion in the reference regarding First Appeal No. 15 of 1879, *Mul Chand*, plaintiff (1), would govern this case.

The suit does not appear to be multifarious within the terms of s. 17 of the Court Fees' Act. It is one for immoveable property, and a claim for arrears of rent in respect of the property claimed is joined with it under s. 44, *Rule a*, to which s. 45 of the Procedure Code is subject. I do not think that the plaint would be chargeable as provided by s. 17 of the Court Fees' Act. The application of clause ii, s. 7 of the Court Fees' Act seems altogether wrong; the plaintiff asks for house-rent in future, as he would ask for the mesne profits from the date of decree to the date of possession under the decree. It is not a claim for money in the meaning of cl. i.; the rate is known, but not the sum that would be actually due when possession was given under the decree. Probably s. 11 of the Court Fees' Act provides for this part of the claim.

(1) See *ante* p. 676.

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OLDFIELD, J.—The suit in my opinion embraces distinct subjects of the nature of those referred to in s. 17, Court Fees' Act. Here the claim for possession of the house and the claim for rent, which in this suit is by way of damages, arise out of different causes of action and might have been made subjects of different suits. So much of the claim as refers to future rent should be charged for court-fees under cl. i., s. 7, leviable under the provisions of s. 11 of the Act. The objection is quite untenable that this Court has no power to interfere to order that the documents shall be properly stamped, as full power to that effect is conferred by s. 28, Court Fees' Act.

## CIVIL JURISDICTION.

1880  
February 5.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

MIAN JAN (AUCTION-PURCHASER) v. MAN SINGH (DEGREE-HOLDER).\*

*Sale in execution—Act X of 1877 (Civil Procedure Code), ss. 311, 312—Review of judgment.*

On the day fixed for the sale of certain immoveable property in the execution of a decree the Court made an order postponing the sale, but the sale had been effected before such order reached the officer conducting it. The Court, no application having been made to set aside the sale, passed an order confirming it. Subsequently, an application by the decree-holder for a review of this order having been granted, the Court passed an order setting the sale aside as illegal. *Held* that, the sanction to the sale originally given having been withdrawn, the sale could not legally be held, and that the sale which was effected, the order of postponement notwithstanding was unlawful and invalid, and in reviewing its first order and in setting aside the sale as illegal the Court executing the decree had not acted *ultra vires* and its action was not otherwise illegal (1).

On the day fixed for the sale of certain immoveable property in the execution of a decree, the judgment-debtor applied to the Subordinate Judge of Aligarh, the Court executing the decree, for the postponement of the sale. This application was granted, the Subordinate Judge making an order for the postponement of the sale. Before this order reached the officer appointed to conduct the sale,

\* Application No. 43B. of 1879, for revision of an order of W. C. Turner, Esq., Judge of Aligarh, dated the 5th September, 1879, and of an order of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 28th July, 1879.

(1) See also *Maijha Singh v. Jhore Lal*, H. C. R., N.-W. P., 1874, p. 354.

the property had been sold. The Subordinate Judge subsequently, no such application to set aside the sale as is mentioned in s. 311 having been made, passed an order confirming the sale. The decree-holder subsequently applied to the Subordinate Judge for a review of this order. The Subordinate Judge granted this application, and on the 28th July, 1879, made an order setting aside the sale on the ground that it was invalid, inasmuch as an order for its postponement had been passed. The purchaser, who had been a party to the proceedings taken in review, appealed to the District Judge against this order. The District Judge held that an appeal would not lie to him from the order. The purchaser thereupon preferred the present application to the High Court in which he prayed for the revision of the orders of the lower Courts, alleging that the first Court had exercised a jurisdiction not vested in it by law, and the second Court had refused to exercise a jurisdiction so vested.

*Mir Akbar Husain*, for the petitioner.

*Munshi Hanuman Prasad*, for the opposite party.

The judgment of the High Court (PEARSON, J. and STRAIGHT, J.) was delivered by

PEARSON, J.—The first plea in appeal is abandoned as untenable. The statement contained in the second ground of appeal is not accurate. What appears from the proceedings is that the 20th September, 1878, had been fixed for the sale of the judgment-debtor's property in execution of decree in pursuance of an order of the Subordinate Judge, who, on that same date, on the judgment-debtor's application, ordered the sale to be postponed. The sanction to the sale originally given being thus withdrawn, it follows that the sale could not legally be held, and that the sale which was effected, the order of postponement notwithstanding, was unlawful and invalid. It is true that the sale had been effected before the order directing its postponement had reached the officer conducting the sale, but the circumstance, though it exonerates him from blame in the matter, does not make the sale good and valid. It is to be regretted that the Subordinate Judge should have confirmed the sale which he now rightly pronounces to

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have been wholly illegal. It seems that he thought himself precluded from setting it aside *suo motu*, and no application had been made to him to set it aside. Shortly after he had confirmed the sale an application was made to him by the decree-holder to review his order confirming it, whereupon he set aside the sale as illegal, and so virtually reversed his former order. In reviewing his order and setting aside the sale as illegal, we cannot say that he acted *ultra vires* or that his action was otherwise illegal. This application is therefore disallowed and dismissed with costs.

*Application dismissed.*

## APPELLATE CIVIL.

1880  
February 5.

*Before Mr. Justice Spinkie and Mr. Justice Straight.*

BANNO (DEFENDANT) v. PIR MUHAMMAD (PLAINTIFF).\*

*Bond—Mortgage—Registration—Act XX of 1866 (Registration Act), s. 17.*

The immoveable property charged by a bond payable by instalments, dated the 17th December, 1866, was charged for both principal and interest and the first instalment was payable within three years from the date of the bond with the accumulated interest, and the amount then becoming due exceeded Rs. 100. *Held*, in a suit on the bond, that it was an instrument creating an interest in immoveable property of the value of Rs. 100 and upwards and under s. 17 of Act XX of 1866 required registration. *Rajpati Kuar v. Ramsukhi Kuar* (1) followed.

THIS was a suit for Rs. 199-13-9, being Rs. 50, the principal amount, and Rs. 149-13-9, the interest, due under a bond dated the 17th December, 1866. The plaintiff, to whom this bond had been assigned by the obligee, one Ali Bakhsh, claimed to recover the money in suit by the sale of the immoveable property hypothecated in the bond. Under the terms of the bond the defendant promised to pay the obligee Rs. 50 in manner following, that is to say, "Rs. 20 with interest at two rupees per cent. per mensem within three years, and Rs. 30 with interest at Rs. 3-2-0 per cent. per mensem within four years;" and he hypothecated certain

\* Second Appeal, No. 964 of 1879, from a decree of Maulvi Sami-ul-lah Khan, Subordinate Judge of Moradabad, dated the 7th May, 1879, modifying a decree of Maulvi Ain-ud-din, City Munsif, dated the 6th February, 1879.

(1) I. L. R., 2 All. 40.

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immovable property as security for the payment of the "entire money secured by this bond, principal and interest." The defendant contended in defence to the suit that by s. 17 of Act XX of 1866 the bond required to be registered, and being unregistered it could not affect the property hypothecated therein. The Court of first instance allowed this contention and dismissed the suit. On appeal by the plaintiff the lower appellate Court held that under s. 17 of Act XX of 1866 registration of the bond was not necessary, and gave the plaintiff a decree for Rs. 191-13-9, directing that this amount should be recovered from the property hypothecated in the bond.

The defendant appealed to the High Court.

Shaikh *Maula Bakhsh* and *Shah Asad Ali*, for the appellant.

Munshi *Hanuman Prasad* and *Mir Zuhur Husain*, for the respondent.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—It seems to us that this appeal should prevail. By the bond of 17th December, 1866, the property was charged for both principal and interest. The first instalment was payable in three years from the date of the bond with the accumulated interest, and the amount then becoming due would exceed Rs. 100. It was therefore an instrument creating an interest in immovable property of the value of Rs. 100 and upwards, and under s. 17 of Act XX of 1866 required registration. The present case is analogous to one decided by Pearson, J. and Oldfield, J., in *Rajpati Singh v. Ramsukhi Kuar* (1), and the view we now hold is in accordance with the current of decisions in this Court (2), to which our attention was called in the course of the hearing. The appeal is decreed with costs, the judgment of the lower appellate Court reversed and the decree of the Munsif restored.

*Appeal allowed.*

(1) I. L. R., 2 All. 40.

(2) See *Ahmad Bakhsh v. Gobindi*, I. L. R., 2 All. 216; *Kuran Singh v.*

*Ram Lal*, I. L. R., 2 All. 96; and *Darshan Singh v. Hanwanta*, I. L. R., 1 All. 274.

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February 9.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.*

GIRDHARI DAS (DEFENDANT) v. POWLETT, POLITICAL AGENT AND  
SUPERINTENDENT OF THE KOTA RAJ ON THE PART OF THE  
GOVERNMENT OF INDIA (PLAINTIFF).\*

*Parties to a Suit—Political Agent—Superintendent of Raj.*

A suit for property belonging to the Rajah of Kota was brought in the name of the 'Political Agent and Superintendent of the Kota State, on the part of the Government of India.' *Held* that, if the Rajah was the proprietor of the property, he should have been the plaintiff, or, if his right and interest therein had passed to Government, the Government should have been the plaintiff, but the Political Agent and Superintendent of the Kota State was not entitled to sue for the property.

THIS suit was instituted in the Court of the Subordinate Judge of Agra in the name of "Major P. W. Powlett, Political Agent and Superintendent of the Kota State, on the part of the Government of India," the plaintiff claiming certain moveable and immoveable property belonging to the Kota State. The defendant set up as a defence to the suit, amongst other things, that it had been instituted in the name of the wrong person, stating in his written statement, dated the 24th November, 1877, as follows:—"Since the plaintiff admits that the property belongs to the State, he is not competent to file the suit in his own name as Political Agent and Superintendent on the part of the Government of India: neither the Government itself nor the plaintiff as its representative is competent to file this suit." In his written statement, dated the 19th December, 1877, the plaintiff stated as follows:—"The Kota State was placed under the management of the Government of India on the application of the Rajah himself, and it is entirely managed by the Government, and Major Powlett has been appointed Political Agent and Superintendent of the State, on the part of Government: he alone and no other person therefore is competent to institute this suit, and in fact this suit is instituted by the plaintiff for the benefit of the State of Kota, as representative of the Chief and not in any other capacity." It appeared from the evidence adduced by the plaintiff that in or about 1873 the Maharao of Kota had invited the British Government to provide for the due administration of the Kota State promising to abide by whatever

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\* First Appeal, No. 163 of 1878, from a decree of Maulvi Maqsood Ali Khan, Subordinate Judge of Agra, dated the 22nd August, 1878.

arrangements might be made for that purpose. Accordingly the Governor-General in Council appointed one Nawab Sir Faiz Ali Khan, K.C.S.I., minister for the Kota State, whose powers were thus defined in the letter appointing him, addressed to him by the Agent of the Governor-General in Council in Rajputana, dated the 5th February, 1874: "You are invested with full powers of administration, subject only to the general advice and control of the Political Agent, Harauti, and myself: you will refer to us in any matters of difficulty and importance: His Excellency the Viceroy and Governor-General further deems it indispensable that His Highness the Maharao of Kota should be absolutely prohibited from interfering with or thwarting your proceedings: that His Highness should receive a suitable allowance for his support: that all debts in future contracted by His Highness should be treated as unauthorised and irrecoverable: that His Highness should have no power whatever to tamper with the revenues of the state: that your proceedings as minister, when concurred in by the Political Agent and myself, shall, if necessary, be enforced by the British Government: that the appointment of subordinate officials shall be left to my discretion, and that any member who may be associated with you in the administration of the Kota State shall be in subordination to you and bound to execute your requirements." In December, 1876, the Governor-General in Council appointed Major P. W. Powlett to the charge of the Kota State in the room of Nawab Sir Faiz Ali Khan, K.C.S.I.

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The first issue for trial framed by the Subordinate Judge was, "Regard being had to the administration of the Kota State, is the suit brought by the Political Agent and Superintendent entertainable or not"? The Subordinate Judge held on this issue that the suit so brought was entertainable. His reasons for so holding appear from the following extract from his judgment:— "The papers relating to the appointment of the said officer show that the arrangement regarding the management of the Kota State was made in a special manner with the sanction of His Excellency the Viceroy and Governor-General of India in Council; that a sum of money has been fixed for the personal expenses of the Rajah; and that he has nothing to do with the administration of

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the State, which is in every respect governed by the Agent and Superintendent, subject to the supervision of the Government of India. There is no law or ruling which would lead me to hold the suit to have been illegally brought in the name of the Agent and Superintendent, nor is there any ground for making such a presumption, inasmuch as it would be clearly improper to judge of the Rajah, who is an intelligent person and attained the age of majority, according to those ordinary persons to whom the law is applicable. Even in the cases of the minor chiefs whose states are managed by Agents under the supervision of the Government of India, suits are not prohibited to be brought in the names of those Agents ; moreover, the powers vested in the present Agent of Kota, who in addition to the usual title of Agent bears the special title of Superintendent, and in the letter of his appointment absolute powers are granted to him, must be considered to be far superior to those vested in the other Agents. Consequently, as he can discharge all the important and intricate business of the State under the powers vested in him, and is in every respect responsible for it, there is no reason why he should not institute this suit, which is brought only for the benefit of the State, in his own name. Now, as far as I can see, I think the suit is properly brought in the name and designation used in the plaint, and considering all the procedure of the Civil Courts, there appears to be no harm at present or in future in passing a decree in that name." The Subordinate Judge eventually gave the plaintiff a decree for the immoveable property claimed.

The defendant appealed from this decree to the High Court, contending that the suit had been instituted in the name of the wrong person and was consequently not maintainable.

Mr. Howard, Mr. Chatterji, and Munshi Sukh Ram, for the appellant.

Mr. Colvin, the Junior Government Pleader (Babu Dwarka Nath Banarji), and Pandit Nand Lal, for respondent.

The following judgments were delivered by the Court :

STUART, C. J.—This appeal must be allowed. Indeed, no serious attempt was made at the hearing before us by the counsel

for the respondent to support the judgment, and I must express my surprise and disappointment, that so experienced an officer as the then Subordinate Judge of Agra should have been content to have given such reasons as he assigns in his judgment for holding that the suit in this instance had been properly laid. It is not pretended that the Rajah is a disqualified proprietor under the Court of Wards, or that he has been in any respect divested of his rights of property over his estate ; and as for the suggestion that the position assumed by the Government of India and its Political Agent in this suit could be justified as an act of State, such a contention cannot for one moment be admitted. The claim for interference on the part of the Government of India, whether in its own name or in that of its Political Agent, is one based entirely on a correspondence shewing the necessity of the management and administration of the estate being for a time taken out of the hands of the Rajah, and he himself no doubt acted wisely in applying to the Government for assistance in his troubles. But it is a very different thing to say that such management and administration gave the Government, not only the power to administer the estate for the benefit of the Rajah, but to deprive him of his right and title in it and his dominion over it, to such effect, that the Government could by itself, or by any of its officers, deal with it and with parties indebted to it as if it was the Government's own independent property. For, however large the power of the Government might be in the way of administration and management, the right to the estate itself and every part of it, the title to the estate and all that constitutes a *jus in re* in regard to it, remained in and was inherent in the Rajah himself, and such a suit as the present could only be brought in his own name, by which means, and by which means alone, could his consent as the true plaintiff be made to appear on the face of the record. In such a case the Government of India neither have themselves, nor can they delegate to others, any larger powers than those that could be given to any other administrator or manager ; and the principle on which this view of the case rests is that no man who is *sui juris* can be deprived of his property, for a single moment, or for any purpose whatever, excepting by his own deliberate consent and act, such an act on his part as would in law have the effect of at once divesting himself of,

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and investing his transferee with, his estate. No doubt the services agreed to be given to the Rajah on his own application were most important and likely to be very beneficial to himself and his property, but the estate has still remained his, and is his, and his alone, and his name alone can be used in all judicial proceedings connected with its administration. As for Major Powlett, he, as Political Agent and Superintendent of the estate under the orders of the Government of India, has simply no *locus standi* whatever, nor could he be allowed to represent the Government of India, in such a suit, even if that Government had itself a better title than it has.

The appeal is allowed and the suit is dismissed with costs in both Courts.

PEARSON, J.—The property in suit is claimed as belonging to the Kota estate, and the claim is based on the proprietary right of the Rajah of Kota. If he be the proprietor of the property the subject of the claim, he should have been the plaintiff in the suit; on the other hand, if his right and interest therein has passed to the Government of India, the Government of India should be the plaintiff. The Political Agent and Superintendent of the Kota Raj does not profess to have any such proprietary right and interest in the property as to entitle him to sue as plaintiff for its recovery. The suit, as brought, must be dismissed, and the appeal decreed with costs.

*Appeal allowed.*

## FULL BENCH.

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February 9.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

EMPRESS OF INDIA v. SRI LAL AND OTHERS.

*Act XLV of 1860 (Penal Code), ss. 372, 373—Buying or selling minor for the purpose of prostitution, &c.*

Certain persons, falsely representing that a minor girl of a low caste was a member of a higher caste, induced a member of such higher caste to take her in marriage and to pay money for her in the full belief that such representation was true. *Held, per* STUART, C. J., that such persons could not be convicted, on these facts, of offences under ss. 372 and 373 of the Indian Penal Code. *Per* OLDFIELD,

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J. and STRAIGHT, J., that, if such girl was disposed of for the purpose of marriage, it could not be said, because the marriage might be invalid under Hindu law, that such persons acted with the intention that she should be employed or used for the purposes of prostitution or for any unlawful and immoral purpose, or that they knew it to be likely that she would be employed or used for such purpose, and consequently they could not be convicted of an offence under those sections. *Per* PEARSON, J., and SPANKIE, J., that, such girl having been disposed of for the purpose of marriage, although the marriage might be objectionable under Hindu law, it did not appear that it was wholly invalid, and therefore such intent or knowledge could not certainly be presumed, and such persons could not be convicted of offences under those sections.

This was a reference to the Full Bench by Straight, J. The facts out of which the reference arose and the point of law referred are stated in the order of reference.

STRAIGHT, J.—These are appeals against a series of convictions by the Officiating Sessions Judge of Gorakhpur. The appellants were charged under ss. 372 and 373 of the Penal Code. The evidence establishes that they, by falsely representing certain girls of the Baniah, Dome and other castes to be members of Kayasth, Rajput, and Ahir families induced a number of Kayasths, Rajputs, and one Ahir to take these girls to wife and to pay money for them to the appellants in full belief that the representation was true. The question I have to refer for the decision of the Full Bench is whether under such circumstances the convictions on ss. 372, 373, Penal Code, can properly stand

The *Junior Government Pleader* (Babu Dwarka Nuth Banarji), for the Crown.

The accused persons were not represented.

STUART, C. J.—On the facts as stated to us in this reference and as explained at the hearing, it is quite clear that the convictions under ss. 372 and 373 cannot stand. The offence apparently committed by the accused was cheating. There can be no doubt of the immorality of the purpose and motive on the part of the accused, but I hesitate to say that their conduct was unlawful in any absolute sense. On discovery the girls, who by fraud had succeeded in becoming wives, and who had in the meantime communicated loathsome disease to the unfortunate men who had married them,



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were turned out of their so-called husbands' houses, and it would appear from what was stated at the hearing that their course of life thereafter was that of prostitution, so that what began in fraud to the husbands has ended in the permanent degradation of the wives themselves. Again, the girls appear to have been parties to the fraud committed on their husbands, having been duly instructed beforehand by the accused as to the part they were to play and the deceit they were to practise on the unhappy men, and they acted the part so well that the ceremony of marriage was gone through without any suspicion being entertained that anything was wrong. That this state of things could not be reached by any law, civil or criminal, I hesitate to affirm. The appellants in the present case might have been tried for cheating under s. 415 of the Penal Code, and I am inclined to think that a very strong argument might be maintained in support of the opinion that these girls, wives though they be, were guilty of abetment and conspiracy, within the scope and meaning of s. 107. The convictions, however, under ss. 372 and 373 were altogether mistaken, and should be set aside.

PEARSON, J.—If, as I understand the referring order to mean, the evidence establishes no more than this, that the appellants, “by falsely representing certain girls of the Baniah, Dome and other low castes to be members of Kayasth, Rajput, and Ahir families, induced a number of Kayasths, Rajputs, and one Ahir to take these girls to wife and to pay money for them to the appellants in full belief that the representation was true”, then I am clearly of opinion that they cannot be convicted of the offence defined in s. 372, Indian Penal Code. For conviction of that offence it must be proved that the accused intended that the minor should be employed or used for the purpose of prostitution or for some unlawful and immoral purpose, and knew it to be likely that the minor would be so employed or used. Not only are we given to understand that evidence of such intent or knowledge is wanting; but it would seem that under the circumstances such intent or knowledge cannot certainly be presumed. The girls were disposed of for the purpose of being married, and, although the marriages might have been objectionable under Hindu law on the ground

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of the inequality in respect of social status of the respective parties to them, it does not appear that they would have been wholly invalid. The offence of which the appellants were apparently guilty was cheating as defined in s. 415, Indian Penal Code.

SPANKIE, J.—I concur in the opinion of Mr. Justice Pearson.

OLDFIELD, J.—If the accused intended *bonâ fide* that the girls should be taken in marriage, although, by reason of difference of caste, no legal marriage might take place under Hindu law (and on this point it is unnecessary to give an opinion), yet the accused will not be guilty of an offence under ss. 372 and 373, Indian Penal Code, for it cannot be said that they acted with intent that the girls should be employed or used for purpose of prostitution or for any unlawful and immoral purpose, or that they knew it to be likely that they would be employed or used for such purpose. The reference does not require us to go further in our reply or to say what offence under the Penal Code the accused may have committed.

STRAIGHT, J.—Upon the question I have submitted to the Full Bench in this reference, I am of opinion, that the convictions under ss. 372 and 373 cannot be sustained. The main object and real intent of the accused was to get money and the representations made were merely the means to that end. I do not think it can be said, that the prohibited act was done with the intent, that the minor should be used for an “unlawful and immoral purpose.” All the false statements were directed to convincing the proposed purchasers of the girls of their caste qualifications for marriage, and the Sessions Judge specifically found that the buyers were deceived. This is clear from the fact, that in each case the ceremony of marriage was gone through with all the accustomed formalities attending such proceedings, and it is equally plain, that the accused, never contemplating that discovery of their frauds would take place, intended, that the girls should live as the wives of their purchasers. It was contended by the Junior Government Pleader, that, as in point of fact no proper or recognizable marriage could take place between persons of these different castes, the accused must be assumed to have intended the

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natural consequences of their acts, namely, that the ultimate position of the girls would be that of mere mistresses. Even if this be so, which I very much doubt, it cannot be said, that that is an "unlawful and immoral purpose." It may be immoral, but it is impossible to say it is unlawful. The mischief aimed at by these sections was traffic in female minors for purposes of "prostitution," that is, in its perfectly well-understood sense, "or for any unlawful and immoral purpose" of a like description. But here a form of marriage, no matter what its precise character was, was gone through, and though the men who took part in it have been punished by being put out of caste for disregarding the rules and regulations of their community, it does not appear to me, that the girls should, for the purposes of the law, be regarded as any the less the wives of those excommunicated persons.

Entertaining the views I do, I am of opinion that the convictions under ss. 372 and 373, Penal Code, must be set aside.

## APPELLATE CIVIL.

*Before Mr. Justice Spankie and Mr. Justice Straight.*

JANKI DAS (DEFENDANT) v. BADRI NATH (PLAINTIFF).\*

*Suit for money charged on Immoveable Property—Jurisdiction—Mortgage—First and second mortgages--Sales in execution of decrees enforcing mortgages—Auction-purchasers.*

*Held* that a suit for money charged on immoveable property in which the money did not exceed Rs. 1,000, although the value of the immoveable property did exceed that sum, was cognizable by a Munsif, such property being situate within the local limits of his jurisdiction.

Certain immoveable property was sold on the same day in the execution of two decrees, one of which enforced a charge upon such property created in 1864 and the other a charge created in 1867. *Held* that the purchaser of such property at the sale in the execution of the decree, which enforced the earlier charge, was entitled to the possession of such property in preference to the purchaser of it at the sale in the execution of the decree which enforced the later charge, notwithstanding the latter had obtained possession of the property in virtue of his purchase. *Ajoodhya Pershad v. Moracha Koor* (1) distinguished.

\* Second Appeal, No. 785 of 1879, from a decree of H. Lushington Esq., Judge of Allahabad, dated the 6th May, 1879, reversing a decree of G. E. Knox, Esq., Subordinate Judge, dated the 24th December, 1872.

(1) 25 W. R., 254.

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On the 14th November, 1864, one Chotay Lal executed a bond in favour of Munni Bibi in which he promised to pay her Rs. 500 with interest at two per cent. per mensem within two years, and in which he hypothecated his proprietary interests in a certain house, situate at Allahabad, as collateral security for such payment. On the 24th June, 1867, Chotay Lal executed a bond in favour of Janki Das, the defendant in this suit, in which he promised to pay him Rs. 1,800 with interest at one per cent. per mensem within seven years, and in which he hypothecated a moiety of the same house as collateral security for such payment. Munni Bibi sued Chotay Lal on her bond, in the Court of the Munsif of Allahabad, for Rs. 720, and obtained a decree on the 9th March, 1872, giving her a lien on the hypothecated property for that amount. Janki Das subsequently sued Chotay Lal on his bond in the Court of the Subordinate Judge of Allahabad, and obtained a decree on the 1st August, 1874, giving him a lien on the hypothecated property for the amount of the decree. On the 10th December, 1877, a moiety of the house, being the interest of Chotay Lal therein, was put up for sale in the execution of Munni Bibi's decree under the order of the Munsif, and was purchased by the plaintiff in this suit, Badri Nath. On the same day the same property was put up for sale in the execution of Janki Das' decree under the order of the Subordinate Judge and was purchased by Janki Das, who obtained possession of the property in virtue of his purchase. Badri Nath, on endeavouring to obtain possession of the property in virtue of his purchase, was resisted by Janki Das. On his complaint the Munsif inquired into the matter of the resistance and made an order against him. He accordingly brought the present suit against Janki Das to establish his right to the possession of a moiety of the house. The defendant stated in his defence to the suit as follows:—"Chotay Lal, the judgment-debtor and original owner of the house in dispute, was indebted to several creditors: to defraud those creditors of their just dues and to secure his house from attachment, he executed, without consideration or any money paid, under false language and with dishonest intent, a bond in favour of Munni Bibi, his sister: this bond after execution and registration he kept in his own possession: as

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soon as the creditors came down upon him he borrowed from Ram Prasad, brother of the defendant, Rs. 1,000, through Munni Bibi, and executed a bond for the same : this bond bears date 24th June, 1867 : a short time before the date for paying this bond fell due, he got Munni Bibi to bring a case against him founded upon the bond in her favour and caused a decree to be passed against him on the 9th March, 1872 : Munni Bibi, her mother, and the judgment-debtor himself have told many persons that the bond in favour of Munni Bibi was written only to keep the property from attachment, and that no consideration ever passed for the same : as the bond upon which the decree was passed under which plaintiff eventually became a purchaser was one without consideration and collusive, it follows that rights resting upon the auction under such circumstances can bear no comparison with defendant's claim, which is a just one and free from all taint of collusion : further the plaintiff by another act of collusion caused the house to fetch at auction a much lower sum than it was really worth".

The issues fixed by the Subordinate Judge were (i), Which of the two decrees confers a prior right upon the purchaser, and (ii), Was the decree passed by the Munsif of Allahabad on the 9th March, 1872, one within the jurisdiction of that Court. The Subordinate Judge dismissed the plaintiff's claim for the reasons stated in the following extract from his judgment :—" In this case the rival applicants for possession of the same half of a house situate in the city of Allahabad are Badri Nath and Janki Das. They both base their claims upon a purchase at open auction held by two different Civil Courts on one and the same day. There is no evidence tendered to show whether there was any priority of time in the sale. It is, however, undisputed that Janki Das was the first to obtain possession and that he has been in possession ever since. Being a possessor with a title it is incumbent upon the plaintiff to show that he has a better title under which to demand the re-conveyance of the property from defendant to himself. The position in which defendant stands is briefly this. There has been a public avowal of a sale between the Civil Court as agent for the judgment-debtor and the defendant as vendee. The transfer was at once

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complete. It was perfected by possession, and the defendant can now only be compelled to re-convey to a prior vendee. If the plaintiff could show such priority he ought to have done so. Instead of this he has confined himself to showing that the decree under which he purchased proceeds from a bond of an earlier date than the bond which led to the execution and sale under which defendant purchased. There might have been some object in this had he been striving to establish a charge upon the property in dispute. The bond was not in his favour, but in favour of Munni Bibi, and even to her it gave only a lien upon the house hypothecated therein. The document, which stands upon the file as exhibit A, shows that the mortgage in favour of the lady was a simple mortgage in which the borrower bound himself personally for the repayment of the loan with interest, and pledged his land as a collateral security for such repayment. Under such a mortgage, as Mr. Macpherson (1) shows, the mortgagee, having obtained a decree, proceeds in execution to sell the land and out of the proceeds of the sale to satisfy his claim.

“ Munni Bibi's right was nothing more than a right to certain money with interest. She never had possession of the land, nor could she ever obtain possession unless she proceeded at the sale to become the vendee. Nor was her position altered by the decree which was correctly given in the first instance against the person of the mortgagor. We come lastly to the sale, and here for the first time we have a starting of possession in favour of plaintiff against the vendor. It has, however, been already shown that, for all that has ever been shown to the Court, the plaintiff's and defendant's starting point were one and the same ; any how, the defendant being in possession, plaintiff must show his priority. The burden being upon him and not having been discharged, the Court finds the first issue against him.

“ As regards the second issue, it is unnecessary here to enter into the grounds upon which the Court holds it has cognizance. The plaintiff maintains the Court has cognizance and the Court agrees with him on the point. Having, however, found against

(1) Macpherson on Mortgages, 2d Ed. p. 13.

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him on the first issue there is no need to pursue this issue further."

On appeal by the plaintiff the lower appellate Court held that he was entitled to the possession of the property in suit, having purchased it at a sale effected to discharge a lien created prior to the lien in discharge of which the sale at which the defendant had purchased was effected.

The defendant appealed to the High Court.

Mr. Colvin, for the appellant.

Babus *Oprokash Chandar Mukarji* and *Ram Das Chakarbaty*,  
and *Munshi Ram Prasad*, for the respondent.

The judgment of the High Court (SPANKIE, J. and STRAIGHT, J.) was delivered by

SPANKIE, J.—In dealing with the pleas in appeal it is necessary to see what was the defence set up. It was briefly as follows; that Chotay Lal the judgment-debtor and original owner of the house in dispute was indebted to several creditors, and, to defraud them and secure his house from attachment, he dishonestly executed a bond hypothecating the house to Munni Bibi, his sister, without any consideration, the transaction being altogether fraudulent. He retained possession of the bond, but, when pressed by his creditors, he borrowed from Ram Prasad, the brother of defendant, Rs. 1,000, through Munni Bibi, and executed a bond for that sum. The bond is dated 24th June, 1867. Before the bond fell due the judgment-debtor caused Munni Bibi to bring a suit against him founded upon the bond which he had given her, and on the 9th March, 1872, a decree was given against him.

Now the plaintiff's case is that the bond under which the decree was executed and sale in his favour was had is dated 14th November, 1864. Both plaintiff and defendant are auction-purchasers upon the same day in execution of decrees. The decrees are of two different Courts. The plaintiff purchased in execution of the decree of the Munsif upon the bond dated 14th November, 1864, and the defendant purchased in execution of the decree of the

Subordinate Judge upon the bond executed on the 24th June, 1867. In both bonds there was an hypothecation of the house as security for the payment of the debt.

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The Subordinate Judge on the 28th November, 1878, laid down the following issue, "Which of the two decrees confers a prior right upon the purchaser." On the 18th December he added this issue, "Was the decree passed by the Munsif of Allahabad on the 9th March, 1872, one within the jurisdiction of that Court." The second issue was added because in the first instance the property was valued at Rs. 1,200 by the Munsif, and the plaint was returned by him on the ground that the claim was beyond his jurisdiction. The Subordinate Judge found that there was no evidence to show that there was any priority in the time in favour of one auction purchaser over the other. But Janki Das, defendant, obtained possession first, under his sale, and, therefore, as Janki Das was a purchaser with title, the plaintiff was bound to show a better title, if he desired to secure the property for himself. In coming to a conclusion upon this point the Subordinate Judge appears to have made a mistake in assuming that in the decree of the 9th March, 1872, there had been no decree against the property hypothecated as security in the bond dated the 14th November, 1864. He seems to hold that the plaintiff failed to prove any priority of lien, and, as defendant had obtained possession in execution as auction-purchaser, his possession could not be disturbed. The Subordinate Judge did not think it necessary to express his reason for holding that the Munsif of Allahabad had jurisdiction in the suit in which he made the decree of the 9th March, 1872, at the same time he held that there had been jurisdiction. The first Court then dismissed the suit on the ground that plaintiff had established no title as against defendant. In appeal the Judge reversed the decision of the Subordinate Judge, and decreed the claim in favour of plaintiff. The lower appellate Court held that the decrees were not money decrees, but both had been made in suits to recover money by enforcing the security hypothecated in the bonds upon which the claims were based, and that priority would be found according to the dates of the respective bonds. The plaintiff as auction-purchaser in execution of a decree against person and property hypo-



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thecated in a bond dated 14th November, 1864, would thus have a prior title as against an auction-purchaser in execution similarly situated in execution of a decree under a bond dated 14th June, 1867, the sale to satisfy a prior incumbrance being preferred to that satisfying a subsequent incumbrance.

The first plea for determination is the fifth in the memorandum of appeal, that of jurisdiction. There can be no doubt (assuming that we could go behind the decree of the 9th March, 1872) that the Munsif had jurisdiction. The claim was for money and to enforce the security, the property hypothecated being within the jurisdiction of the Court. The cases cited by defendant appellant's counsel do not apply. The Calcutta Court (*Petition of S. J. Leslie* (1)) has ruled that a suit brought upon a mortgage praying for a decree for the amount due under it, and also that in default of payment the land might be sold, was a suit for land within the meaning of s. 15, Act VIII of 1859, and was rightly brought in the Court of the district within which the land is situate. The question there was one of territorial jurisdiction; no such difficulty arises in this case. So again the Full Bench decision of the Presidency Court in *Surwar Hossein Khan v. Shahzada Gholam Mahomed* (2) does not affect this case, for in that suit the question was one of limitation which does not arise here. Admitting that the suit is one to enforce a charge upon immoveable property, and is therefore one for the recovery of an interest in immoveable property, still the claim is to enforce that charge only to the extent of the debt due, and no further. The property could have been preserved from attachment and sale by payment of the debt due, which with interest was within the pecuniary jurisdiction of the Munsif's Court. The plea, therefore, that the suit upon which the decree on the bond dated 14th November, 1864, was given, and in execution of which the plaintiff became the auction-purchaser, is barred, because the value of the property exceeded Rs. 1,000, fails.

As to the other pleas, the judgment of the lower appellate Court decreeing the claim in favour of plaintiff-respondent appears to be sound, and in accordance with the practice of the Courts.

(1) 9 B. L. R., 171. (2) B. L. R., F. B R., 879.

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The precedents cited by the appellant, *Dayal Jairaj v. Jivraj Ratansi* (1), do not seem to apply. There is no question here of notice or no notice of a prior incumbrance. The circumstances of this case, such as they are, must be looked at. Here there was in execution a sale of the same property twice over under two different decrees of two different Courts, and the question is whether the auction-purchaser, who has bought the property sold in execution of a decree charging it for the satisfaction of the debt due under a bond of much earlier date, is not to be preferred to the auction-purchaser in execution of a decree to satisfy a more recently executed bond, and on this point there was really no defence. It has already been noticed at the commencement of this judgment what was the defence to the suit. It was contended that the bond on which plaintiff relied was executed fraudulently, and that the bond upon which defendant relies was free from all taint of fraud and therefore was to be preferred to that of plaintiff. It did not appear to be denied that, if the plaintiff could show a better title, he was entitled to a decree. The first Court under a misapprehension as to the nature of the decree holds that the plaintiff had not established a better title than defendant had, and therefore the Subordinate Judge dismissed the claim. The Judge, correcting the error of the Subordinate Judge as to the nature of the decree, finds that the lien in the plaintiff's case was of a date prior to that of the lien in the defendant's case, and, as there appears to be nothing contrary to law in this finding, our interference is not required.

The purchaser at an auction-sale in execution of a decree against a judgment-debtor is bound to satisfy all charges on the estate purchased by him which existed at the time of the mortgage, to satisfy which the property was sold. I have not found any cases exactly analogous to the present which is somewhat peculiar, the sales being simultaneous, under different decrees, and in two different Courts. But the principle above noticed may be applied to the case, and as both parties purchased the property at auction in execution of decrees charging it, the plaintiff's title appears to be superior to that of

(1) I. L. R., 1 Bom., 237.

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the defendant, inasmuch as he purchased in execution of a decree upon a bond of prior date to that which was the foundation of the claim that led to a decree in execution of which defendant purchased. The earlier possession of defendant under the auction-sale was simply an accident arising out of the simultaneous sales in two different Courts. I notice a case in the Presidency Court, *Ajoodhya Pershad v. Morucha Kooer* (1), where the claims of both the parties were on bonds specially registered under ss. 52, 53, Act XX of 1866, so that neither decree could have legally imposed any lien on the property. The estate was sold by auction on two occasions in satisfaction of two distinct bonds, and the person who had proceeded on the later-dated of the two bonds, but who represented the earlier auction-purchaser, had actually taken possession of the estate. It was held that, though in a properly brought suit between the parties to declare the property liable for the amount of the first mortgage, the party in possession would have to pay to secure his possession, yet he could not be ousted by the opposite party. This case differs from the present one in so much that the decrees in the precedent cited must be regarded as money-decrees, whereas in the present case both decrees charged the property. Moreover in that case the sales were not simultaneous, but one occurred on 25th January, 1869, and the other on the 9th March, 1869. Here it appears to me that I ought to consider what would have been the effect, if by accident or otherwise there had been two simultaneous sales in execution of two decrees charging property by order of the same Court. In such a case effect would doubtless have been given to the auction-purchase under the decree upon the older lien, and, under the circumstances of the case, it appears to me that the plaintiff is entitled to claim possession of the property, and that the sale in favour of defendant should be considered of no effect as against that in favour of plaintiff, and his possession should be regarded as not having been acquired under any good title. Here again I should say once more that the claim was not resisted by the defendant on the ground of his title being superior to that of the plaintiff under the sale, but mainly, if not altogether, on the

ground that the decree under which the plaintiff purchased was a decree obtained in a fraudulent transaction and therefore should have no force. On this point, if it be allowed that we could go behind a decree which has not been set aside, it is sufficient to say that the Judge has found that the defendant declined to give any evidence in support of the plea of fraud. As he asserted the fraud he was bound to prove it, as he did not even attempt to do so, there is an end of the plea. I would dismiss the appeal and affirm the judgment with costs.

*Appeal dismissed.*

*Before Mr. Justice Spankie and Mr. Justice Straight.*

SAWAI RAM (PLAINTIFF) v. GIR PRASAD SINGH (DEFENDANT).\*

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*Wrongful dispossession of land—Compensation for wrongful dispossession—Jurisdiction—Act XVIII of 1873 (N.-W. P. Rent Act), s. 95, clauses (m) and (n).*

In an estate held by *S* as a sub-proprietor he held certain land with a right of occupancy. *G*, the zamindar, obtained a decree against *S* in a Civil Court for the possession of the estate, in execution of which he ousted *S* from the estate including the land held by him with a right of occupancy. This decree having been set aside, *S* recovered the possession of the estate including such land, and sued *G* in the Civil Court for the value of the crops standing on such land at the time he was ousted from it by *G*, and for the rents of a portion of such land which *G* had let to tenants while in possession of it. Held that the suit was cognizable by the Civil Courts (1) and that *G* was liable for such rents.

IN the year 1874 the plaintiff in this suit was in the possession of a certain estate paying revenue to Government, situate in the Aligarh district, of which the defendant was the proprietor. At the settlement of this estate in that year a dispute arose between the plaintiff and the defendant as to the nature of the former's possession. On the 21st December, 1874, the Settlement Officer made an order which declared that the plaintiff was the lessee of the estate for an indefinite term, and that he was also an occupancy-tenant of fifty-one bighas, ten biswas, of land comprised in the estate. The defendant subsequently instituted a suit against the plaintiff in the Court of the Subordinate Judge of Aligarh, for his ejectment

\* Second Appeal, No. 991 of 1879, from a decree of C. W. Moore, Esq., Judge of Aligarh, dated the 23th July, 1879, modifying a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 29th March, 1879.

(1) See also *Kalian Das v. Tika Ram*, I. L. R., 2 All. 137.

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from the estate and for the cancelment of the Settlement Officer's order, alleging that the lease under which the plaintiff held the estate had expired. He obtained a decree in this suit on the 29th July, 1876. On the 31st August, 1876, in the execution of this decree, the plaintiff was ejected from the entire estate including the fifty-one bighas, ten biswas, of land. On the 7th December, 1877, this decree was set aside and the defendant's suit dismissed by the District Court, on appeal by the plaintiff, which decided that the plaintiff held the estate, not as a lessee, but as a sub-proprietor under a permanent tenure. The District Court's decree was affirmed by the High Court on the 16th May, 1878. After the passing of the High Court's decree the plaintiff, on the 4th July, 1878, recovered the possession of the entire estate. He subsequently, in November, 1878, instituted the present suit against the defendant in the Court of the Subordinate Judge of Aligarh, in which he claimed, *inter alia*, (i) the value of the crops standing on the fifty-one bighas, ten biswas, of land at the time the defendant obtained possession of such land in the execution of the decree dated the 29th July, 1876, alleging that the defendant had appropriated such crops: and (ii) the rents of forty-eight bighas of land, being a part of the fifty-one bighas, ten biswas, before mentioned, which the plaintiff alleged had been let by the defendant to tenants. The Subordinate Judge gave the plaintiff a decree in respect of these claims. On appeal by the defendant the District Judge dismissed the suit in respect of these claims for the reasons which appear in the following extract from his decision:—

“It is to be observed that the plaintiff in this suit has always had two different rights in this village; first, his rights as lessee of the zamindars, secondly, his rights as an occupancy-tenant of fifty-one bighas, ten biswas, of land. With these latter rights the Civil Court has no concern, nor has any order been passed by, or any claim been made in, any Civil Court throughout these proceedings which could affect the plaintiff's possession as an occupancy-tenant of the fifty-one bighas, ten biswas, of land. The Civil Court's orders have always had reference to the zamindari rights held by the lessee. It follows, then, that any interference with the plaintiff's rights as an occupancy-tenant, of which the defendant may have

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been guilty, was made by the defendant as zamindar in possession, and had no warrant of the Civil Court to support them. It is clear also that the defendant was in possession as zamindar from August, 1876. It appears to me that, when in August, 1876, the defendant turned the plaintiff out of his occupancy-tenancy and seized the standing crops on the lands comprised therein, the plaintiff might and should have made applications under s. 95, clauses (m) and (n), of Act XVIII of 1873. Those applications should have been made within six months of the cause of action (s. 96, e.), and as those applications 'might have been made', no other Court (s. 95) can take cognizance of the matter to which they would have referred. It is nothing to the purpose to say that the plaintiff was awaiting the end of the litigation in the Civil Courts. The action of the defendant in seizing the crops and turning plaintiff out of his cultivation was always wrongful. It has not become so only under the Civil Court's final decree, though that decree may throw a stronger light on the wrong. I have, therefore, no hesitation in deciding that the claim on account of the standing crops is not cognizable here, and would be, in my opinion, barred by limitation, even if the Court had jurisdiction, as this seizure of the standing crops was never ordered by the Court and was outside the litigation between the parties.

"Turning now to the claim of the plaintiff to the rent of the "*khud-kasht*" land, no doubt the defendant had the right to collect the rents of that land from the plaintiff (if the defendant had not ousted plaintiff), as long as he (defendant) was in possession as zamindar, and now that defendant's possession as zamindar has been restored as lessee, the plaintiff is entitled to receive from defendant what defendant was entitled to collect and could accordingly have collected. The lower Court has found as a fact that the land in question was let by the defendant in 1285 fasli for Rs. 175, and from this fact has deduced that the rent for the rabi of 1284 fasli should have been Rs 72-14-0. These, however, are rents which the defendant collected from tenants at will, with whom, so far as the Civil Court is concerned, he had no right to deal in connection with plaintiff's "*khud-kasht*" land. These sums in fact represent the damage resulting to plaintiff, not only from his ejectment from his

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lease, but also from his "*khud-kasht*" lands. As already remarked by this Court, the Court below has no concern with the latter ejectment and resulting damage.

"The question is how much the defendant received from the land (*khud-kasht*) as zamindar and by virtue of the rights held to be his by the Civil Court.

"There is no evidence to show. In fact, as regards 1284 fasli, if the plaintiff is to be believed, defendant received nothing but the crops standing on the land, a matter I have already disposed of."

The plaintiff appealed to the High Court.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellant.

Pandit *Bishambhar Nath* and Munshi *Kashi Prasad*, for the respondent.

The judgment of the High Court (SPANKIE, J., and STRAIGHT, J.), so far as it is material for the purposes of this report, was as follows :—

SPANKIE, J. The facts of the case are very clearly set forth by the first Court in the elaborate judgment in favour of the plaintiff. In appeal the Judge modified the first Court's judgment, finding that, when plaintiff has been dispossessed from the lands comprising his occupancy-right as tenant, he should have made an application under clauses *m*) and *n*), s. 95, Act XVIII of 1873, and, as this application might have been made, the Civil Court had no jurisdiction to hear this part of the claim, which, indeed, if the Civil Court could have entertained it, was barred by limitation.

It is contended by the plaintiff that the Civil Court had full jurisdiction : the plaintiff in bringing this suit had adopted the only course open to him, his ejectment having been carried out in execution of a decree of Court, and this decree having been subsequently set aside : the Judge too had erred in holding that the claim was barred by limitation, and in dismissing the claim on account of the "*khud-kasht*" lands.

We are of opinion that the applications referred to in letters (*m*) and (*n*), for compensation for wrongful dispossession, or for

recovery of possession of land of which a tenant has been wrongfully dispossessed, do not apply to the present case, in which there was no wrongful dispossession within the meaning of the Rent Act, and that the claim of the plaintiff was not one for which a remedy was available under s. 95 of that Act, and, therefore, the Civil Court had jurisdiction. Holding this view, it follows that the limitation of s. 96 of the Rent Act does not apply. So, we think that the Judge was wrong in dismissing the claim for the rent of the "*khud-kasht*" land which defendant let to tenants. The effect of the decree against the present plaintiff, when executed, put him out of possession of the entire estate which he held as lessee, and defendant took possession of all the lands. Therefore plaintiff is clearly entitled to a refund of all rents to which the lessee alone had a claim, if he had chosen, as defendant did, to let a portion of his sir.

*Appeal allowed.*

*Before Mr. Justice Pearson and Mr. Justice Straight.*

RAM LAKHAN RAI (PLAINTIFF) v. BANDAN RAI AND OTHERS (DEFENDANTS).<sup>\*</sup>

*Vendor and Purchaser—First and Second Purchasers.*

The proprietor of certain immoveable property conveyed it first to one person and then to another. The first purchaser sued the vendor and the second purchaser for the possession of the property, alleging that he had been put in possession of it but had been ousted by the second purchaser. *Held* that the first sale was not void by reason of the non-payment of the purchase-money, and that, the second sale being invalid as having been made by a person who had no rights and interests remaining in the property, the second purchaser was not a representative of the vendor and entitled to receive the purchase-money found to be still due to him from the first purchaser, and to retain possession of the property until the receipt of that purchase-money.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi Hanuman Prasad and Sukh Ram, for the appellant.

Lala Latta Purshad and Babu Lal Chand, for the respondents.

<sup>\*</sup> Second Appeal, No. 725 of 1879, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 27th March, 1879, modifying a decree of Maulvi Mir Badshah, Munsif of Saidpur, dated the 21st December 1878.



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v.  
BANDAN RAI.

The judgment of the High Court (PEARSON, J. and STRAIGHT, J.) was delivered by

PEARSON, J.—The plaintiff sued to recover possession of an eight gandas share in mauza Chandipur under a sale-deed executed in his favour by Ram Bakhsh, defendant, on the 7th August, 1874, on the averment that after his purchase he had been put in possession of the property, but had been ousted from it by the other defendants, to whom Ram Bakhsh had ostensibly conveyed the same property by a sale-deed dated 11th December, 1877. The defendant Ram Bakhsh admitted the receipt of the sale-consideration, Rs. 600, from the plaintiff and the truth and justice of his claim. The other defendants contended that the sale-deed of the 7th August, 1874, had been invalidated by the non-payment of the sale-consideration therein mentioned, and that consequently Ram Bakhsh was competent to sell the property, the subject thereof, to them, and that they were lawfully in possession of it under the sale-deed executed in their favour. The Court of first instance allowing these contentions dismissed the suit with costs. The lower appellate Court concurred with the Munsif in finding that the plaintiff had neither paid the sale-price, nor been put in possession of the property, nor been ejected from it by the second vendees, but nevertheless held that the vendor was not free or competent to avoid the first sale. The Subordinate Judge was of opinion that Ram Bakhsh had only a right to sue for the sale-consideration, or to refuse possession of the property to the plaintiff until receipt of that consideration. The Subordinate Judge further ruled that the plaintiff was not entitled to obtain possession of the property without payment of Rs. 600, the sale-consideration, which was payable to the defendants, the second vendees, as representatives of the vendor, whatever rights and interests he had in the disputed property against the plaintiff having passed to them, and that they were accordingly entitled to receive the sale-consideration, or until its receipt to retain possession of the property in question.

The respondents have not taken any objections to the lower appellate Court's decision, and we are bound therefore to accept the ruling that the first sale is not void by reason of the non-payment of the sale-consideration, and that the second sale is invalid as

having been made by a person who had no rights and interests remaining in the property. This being so, we cannot assent to the view that the second vendees are representatives of the vendor and entitled to receive the sale-consideration, found to be still owing to him, and retain possession of the property in suit until the receipt of that consideration. What he sold to them was not the right to receive that consideration, but the property in suit. They were doubtless at liberty to resist the plaintiff's claim on the ground that the sale made to him had been invalidated by his failure to pay the sale-price; but they have not challenged the ruling that it was not so invalidated, and they must submit to the conclusion that the sale made to themselves is invalid, and that they are not entitled to retain possession of the property thereunder.

If then they are not entitled to retain possession of the property until receipt of Rs. 600 from the plaintiff, the question remains whether that sum should be paid to the vendor. To him, if it be due at all, it is due from the plaintiff, but he admitted its receipt in the Court of first instance, and has not claimed it here. From him and not from the plaintiff the second vendees are entitled to recover the price which they paid to him for the property, which the lower appellate Court has ruled that he was not free and competent to sell to them.

For the above reasons we must decree the appeal with costs, and modify the lower appellate Court's decree by reversing that portion of it which directs the plaintiff to pay Rs. 600 and to bear his own costs. Those costs must be paid by the defendants, second vendees.

*Appeal allowed.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Pearson.*

EMPRESS OF INDIA v. KISHNA AND ANOTHER.

*Act XLV of 1860 (Penal Code), s. 201.*

*K and B, having caused the death of J in a field belonging to B, removed J's dead body from that field to his own field with the intention of screening themselves from punishment. K was convicted on these facts of an offence under s. 201*

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of the Penal Code. *Held*, that that section referred to persons other than the actual offenders, and *K* could not therefore properly be punished under that section for what he had done to screen himself from punishment. Also that, as a matter of fact, he did not by removing *J*'s corpse from one field to another cause any evidence of *J*'s murder which that corpse afforded to disappear, and his act, although his object may have been to divert suspicion from himself and *B*, did not constitute the offence defined in that section.

The facts of this case, so far as they are material for the purposes of this report, were as follows :—*Kishna* and *Fauja* were charged before Mr. H. M. Chase, Sessions Judge of Saharanpur, with the murder of one *Jiwan* ; also with the culpable homicide not amounting to murder of *Jiwan* ; and also of causing evidence of the commission of those offences to disappear with intent to screen the offenders, an offence punishable under s. 201 of the Indian Penal Code. With regard to the last charge, it appeared from the evidence at the trial that the two accused persons, together with one *Bhikan*, having caused the death of *Jiwan* in a field belonging to *Bhikan*, had carried his body out of that field and thrown it into his own field. The Sessions Judge convicted *Kishna* of the culpable homicide not amounting to murder of *Jiwan*, and also, under s. 201 of the Penal Code, of having, by removing *Jiwan*'s body, caused evidence of the commission of the culpable homicide to disappear, with the intention of screening himself from punishment.

*Kishna* appealed to the High Court.

The Court's judgment, so far as it is material to the purposes of this report, was as follows :—

PEARSON, J.—No one is present on behalf of the appellant to support the appeal. The grounds on which the findings of the Sessions Judge are appealed against are not apparent from the petition of appeal. Those findings, however, appear to me to be obnoxious to grave objections. The appellant has been found guilty of causing the disappearance of evidence of an offence committed with the intention of screening himself and other offenders from legal punishment. Now s. 201, Indian Penal Code, has been held to refer to persons other than the actual offenders ; and therefore the appellant in this case could not properly be punished for what he

may have done to screen himself from punishment. But, as a matter of fact, he did not, by removing the corpse of Jiwan from one field to another, cause any evidence of Jiwan's murder which that corpse afforded to disappear. His object may have been to divert suspicion from himself or from Bhikan; but his act does not constitute the offence defined in s. 201, Indian Penal Code. The conviction and sentence under that section are therefore annulled.

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## APPELLATE CIVIL.

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February 24.
 

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*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

CHUHAR MAL (PLAINTIFF) v. MIR AND OTHERS (DEFENDANTS).\*

*Bond—Interest—Penalty.*

The obligors of a bond agreed to pay the principal amount by instalments without interest, and in case of default to pay interest at the rate of Rs 3-2-0 per cent. per mensem, and hypothecated immoveable property as security for the payment of the bond-debt, sufficient for the discharge of the debt, and furnished a surety. *Held* by STUART, C. J., in a suit on the bond, that, the principal amount being payable in the first instance without interest, the stipulation to pay interest at the rate of Rs. 3-2-0 per cent. per mensem, in case of default, was a penal one, and reasonable interest should only be allowed. *Held* by SPANKIE, J., that, looking at all the circumstances of the case, the very high rate of interest imposed in case of default should be regarded as penal, and should be reduced.

The Court under the circumstances allowed interest at the rate of one rupee per cent. per mensem.

On the 14th August, 1868, the defendant Mir and one Sumair, as principals, and one Narpāt, as surety, executed a bond in favour of the plaintiff, in which the defendant Mir and Sumair promised to pay the plaintiff Rs. 400 by three instalments, "and in case of default with future interest at Rs. 3-2-0 per cent. per mensem". As collateral security for the payment of the "aforesaid amount" they hypothecated certain immoveable property "in lieu of the amount of the bond". Narpāt, as surety, agreed to pay the amount of this bond in case the principals failed to pay the "aforesaid amount". In July, 1878, the plaintiff instituted

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\* Second Appeal, No. 43 of 1879, from a decree of H. M. Chase, Esq., Judge of Sahāranpur, dated the 26th November, 1878, affirming a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Sahāranpur, dated the 25th July, 1878.

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the present suit against the defendant Mir and the persons representing Sumair and Narpat, who had meanwhile died, claiming to recover on the bond Rs. 1,477, principal and interest, by the sale of the property hypothecated in the bond, and from the estate of Narpat. The plaintiff claimed interest from the dates the three instalments became due and were not paid at the rate stipulated in the bond, viz., Rs. 3-2-0 per cent. per mensem. Both the lower Courts held that this rate was penal and should not therefore be allowed, and awarded interest at the rate only of one rupee per cent. per mensem.

On appeal by the plaintiff to the High Court it was contended on his behalf that the stipulated rate of interest was not penal, and the property hypothecated in the bond being expressly made liable for the payment of principal and interest, interest at the stipulated rate should have been awarded; and that, as the instalments were payable without interest, the rate of interest claimed could not be considered unfair and excessive.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the appellant.

Shah *Asad Ali*, for the respondent.

The following judgments were delivered by the Court :

STUART, C. J.—It is clear that the defendants, who are the debtors under the hypothecation-bond, have been taken advantage of by their greedy and unscrupulous lender. But, if there were nothing else in the case than the mere stipulation for a high rate of interest, it might be difficult to hold that the plaintiff was not entitled to recover on that footing, the usury laws having been repealed, and parties generally in such transactions being left to their contracts. But here there appears to be a peculiarity which takes his case out of the general category to which I have referred. As I understand, the money was lent in the first instance without interest, and, that being so, the subsequent stipulation for Rs. 3-2-0 per cent. per mensem, to be enforced on the defendant's default in paying the instalments, appears to me to be not only penal, but really in the nature of a fraud on the main contract, and interest should be reduced to what is reasonable under all the circumstances.

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I agree with the lower Courts in thinking that one per cent. per mensem would be sufficient, and to this rate my colleague Mr. Justice Spankie is willing to reduce the interest. After date of decree of the first Court six per cent. per annum to be allowed. The judgments of the lower Courts will therefore stand and the present appeal is dismissed with costs.

SPANKIE, J.—Plaintiff-appellant sued defendants-respondents on a bond executed by Mir and Sumair on the 14th August, 1868, for Rs. 400 payable by instalments without interest, and stipulating, in case of default, that the obligors would pay interest at Rs. 3-2-0 per cent. per mensem. The obligors hypothecated twenty-nine bighas of land in mauza Mirzapur, as security for the payment of the debt. One Narpat was also surety. Sumair and Narpat are both dead, leaving Khushal and others, defendants, their sons, in possession of their property.

Mir admitted the bond and also that he was in possession of the estate of Sumair, deceased. He contended, however, that he had only received Rs. 250 out of the Rs. 400 borrowed, as Narpat, the surety, had to take Rs. 150, and he further urged that the provision in the bond for such extortionate interest was penal. Khushal, as heir of Narpat, admitted the bond, but pleaded that the debt should be recovered from the debtors, and, if that could not be done, he was liable for the balance.

The only question now before us in second appeal relates to the interest. The first Court held the condition in the bond to be a penal provision and would not allow it. In appeal the Judge affirmed the decree of the first Court, holding that the rate of interest amounted to a penalty and was excessive.

It is contended by the plaintiff that the ruling of the Courts below as to the interest is erroneous. The property hypothecated in the bond was expressly made liable for the payment of principal and interest, and therefore the plaintiff is at liberty to recover the rate stipulated therein.

Looking at all the circumstances of the case, and the terms of the contract, which are much in favour of the obligee, as the pro-

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perty of the obligors, sufficient for the discharge of the debt, is hypothecated to him in the deed, and besides this another person became surety, I am disposed to regard the very high rate of interest imposed in case of default as being of a penal character. At the same time the money was lent in the first instance without interest, and the deed hypothecates the property both for the payment of the debt and interest; the appellant therefore may have some ground for contending that the interest named in the bond is the consideration agreed to be paid by the borrower to the lender for the use of the money. Still the rate of interest imposed by the terms of the bond is so excessively high, and specially so when the security appears to be good and the risk therefore less, that it seems impossible not to regard the clause respecting interest as a penal one, in case of default, and as there was default, I would give the plaintiff-appellant reasonable compensation, and this I think would be half the rate imposed by the bond to the date of the decree of the Court of first instance, and after that I would allow interest at six per cent. per mensem. But if the learned Chief Justice considers that a less rate should be allowed, I am willing to reduce it to twelve per cent.

*Appeal dismissed.*

*Before Mr. Justice Pearson and Mr. Justice Straight.*

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February 25.

SHEO PRASAD AND ANOTHER (PLAINTIFFS) v UDAI SINGH (DEFENDANT).\*

*Vendor and purchaser—Transfer of immoveable property—Specific performance of contract—Act XV of 1877 (Limitation Act), sch. ii, arts. 113, 136, 144.*

On the 27th October, 1865, the vendor of certain immoveable property executed a conveyance of such property to the purchasers. On that date the vendor was not in possession of the property, although his title to it had been adjudged by a decree against which an appeal was pending. The conveyance did not contain any express promise or undertaking on the vendor's part to put the purchasers into possession. On the 24th February, 1870, the vendor obtained possession of the larger portion of the property and on the 23rd August, 1872, of the remainder. On the 5th October, 1877, the purchasers sued the vendor for the possession of the property, stating that "possession was agreed to be delivered on the receipt of possession by the vendor," and that the cause of action was that the vendor had not put them into possession. *Held* that the suit was not one for

\* First Appeal, No. 55 of 1879, from a decree of Babu Kashi Nath Biswas, Sub-ordinate Judge of Meerut, dated the 17th February, 1879.

the specific performance of a contract to deliver possession to which art. 113 of sch. ii of Act XV of 1877 was applicable, but one to obtain possession in virtue of the right and title conveyed to the purchasers to which either arts. 136 or 144 of sch. ii of that Act was applicable, and that, whichever of them was applicable, the suit was within time.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiffs appealed from the decree of the Court of first instance dismissing their suit.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), Pandit Ajudhia Nath, and Babu Oprokash Chandar Mukarji, for the appellants.

The *Senior Government Pleader* (Lala Juala Prasad), for the respondent.

The judgment of the High Court (PEARSON, J., and STRAIGHT, J.,) was delivered by

PEARSON, J.—This purports to be a suit to obtain possession of landed property sold by the defendant to the plaintiffs on the 27th October, 1865. On that date the vendor was not in possession of the property, although his title to it had been adjudged by a decree of the late Sudder Dewany Adawlat, North-Western Provinces, dated 9th August, 1864, against which an appeal was pending before the Privy Council. But he obtained possession of the larger portion of the property on the 24th February 1870, and of the remainder on the 23rd August, 1872, and the cause of action in this suit is that he has not put the plaintiffs in possession of it.

The lower Court has held the suit to be one for the specific performance of a contract to which art. 113, sch. ii, Act XV of 1877, is applicable, and has dismissed the suit as barred by efflux of time, it having been instituted on the 5th October, 1877, or more than three years after the dates above mentioned.

On examining the deed of sale, we find that it does not contain any express promise or undertaking on the vendor's part to put the vendees in possession. It recites that he has sold to them and received the sale-consideration, and goes on to declare that they,



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regarding themselves as the absolute proprietors thereof, shall remain in possession of it from the date on which he may obtain possession of it in execution of the decree aforesaid.

Such being the terms of the deed, the plaintiffs are not in a position to sue that the defendant may be compelled to put them in possession in fulfilment of a specific engagement to do so, nor is such the prayer of their plaint. As we have already observed, they sue to obtain possession in virtue of the right and title conveyed to them by the sale-deed.

In the 3rd paragraph of the plaint they say that the possession was agreed to be delivered "on the receipt of possession by the vendor," but, inasmuch as there was not really any such express agreement, we must understand what they say to mean no more than that he was bound by an implied agreement to put them in possession.

Taking this view of the nature of the suit, we are unable to concur in the ruling that art. 113, sch. ii, Act XV of 1877, is applicable to it, and we rule that either art. 136 or art. 144 is applicable, and that, whichever of them be applicable, the suit is within time. (The judgment then proceeded to determine the appeal on its merits).

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February 28.

## FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spinkie, Mr. Justice Oldfield, and Mr. Justice Straight.*

RAM PRASAD (DEFENDANT) v. SUKH DAI (PLAINTIFF).\*

*Declaratory decree—Consequential relief—Act VII of 1870 (Court Fees' Act), s. 7, cl. iv. (c), and sch. ii, art. 17 (iii)—Suit to establish right to attached property—Act X of 1877 (Civil Procedure Code), s. 283.*

In a suit, under s. 283 of Act X of 1877, for a declaration of her proprietary right to certain immoveable property attached in the execution of a decree, the plaintiff asked that the property might be "protected from sale." *Held*, that consequential relief was claimed in the suit and court-fees were therefore leviable under s. 7, cl. iv. (c), and not under sch. ii, art. 17 (iii), of Act VII of 1870.

\* Second Appeal, No. 499 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 24th February, 1879, affirming a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 3rd May, 1878.

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This was a reference to the Full Bench arising out of the following facts: A certain dwelling-house having been attached in the execution of a decree as the property of one Ram Dial, the plaintiff claimed to be the owner of the house under a gift. The Court executing the decree disallowed this claim. Thereupon the plaintiff instituted the present suit against the defendant, the decree-holder, in which she claimed that her proprietary right under the gift might be declared, and the house be "protected from sale." She paid in respect of her plaint the *ad valorem* fee computed on the market-value of the house leviable under the Court Fees' Act. The Court of first instance gave the plaintiff a decree as claimed. On appeal by the defendant the lower appellate Court affirmed this decree. On appeal to the High Court from the decree of the lower appellate Court the defendant only paid on his memorandum of appeal the fixed fee leviable in a suit to obtain a declaratory decree, where no consequential relief is prayed. The taxing-officer of the High Court reported that the proper fee leviable on the memorandum of appeal had not been paid, inasmuch as consequential relief was prayed. The Division Bench (STUART, C. J. and SPANKIE, J.) before which the appeal came referred the case to the Full Bench, the order of reference being as follows:—"Finding that the rulings of this Court—S. A. No. 168 of 1879, decided the 13th May, 1880 (1) : S. A. No. 296 of 1879, decided the 29th July, 1879 (2) : S. A. 334 of 1879, decided the 22nd August, 1879 (3) : S. A. No. 384 of 1879, decided the 1st August, 1879 (4)—are contradictory as regards the principle on which court-fees are payable in suits under s. 283 of the Code of Civil Procedure, and that some of them are opposed to rulings of other High Courts—*Jai Narayan Giri v. Grish Chandar Myti* (5) : *Thakur Din Tiwary v. Nawab Syed Ali Husain* (6) : *Bahur-un-nissa Bibi v. Karim-un-nissa Khatun* (7) : *Bank of Hindustan v. Premchand Raichand* (8)—we refer for the consideration of a Full Bench the question whether court-fees are payable in such suits under cl. iv. (c), s. 7, or under cl. iii., art. 17, sch. ii, Act VII of 1870."

The following judgments were delivered by the Full Bench:

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| (1) Unreported. | (5) 22 W. R. 438.                  |
| (2) Unreported. | (6) 21 W. R. 340.                  |
| (3) Unreported. | (7) 19 W. R. 18.                   |
| (4) Unreported. | (8) 5 Bom. H. C. R., O. C. J., 83. |

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STUART, C. J.—Since this case was before Spankie, J., and myself I have had an opportunity of perusing the plaint, and it cannot be doubted that by it, not only a declaration of right, but that consequential relief is also prayed for. And I may observe that in my opinion the plaintiff was quite entitled to frame her suit in this form and was in no way bound to await the eventualities of a mere declaration of right; and she appears to me to have wisely considered that her object would be most effectually attained by a plaint in the form which she adopted. The plaint shows how Sukh Dai the plaintiff acquired the house, which is the subject of the suit, and that her claim as owner had been interfered with by the action of the purchaser of a decree against the house, or rather one-third of it, and that she had applied to have the sale postponed, but that the Munsif had rejected her application. The plaintiff therefore prays for the following relief:—"That her right be established in respect of the said house, or one-third of the said house, valuing Rs. 1,383-5-4, by virtue of the deed of gift dated the 26th March, 1873, and for her possession and enjoyment thereof being protected from sale be established." There cannot be a doubt that consequential and substantial relief is here asked for, and that the court-fee payable is that provided by cl. iv., (c), s. 7 of the Court Fees' Act, and that cl. iii., art. 17, sch. ii. of the same Act has no application.

This is my clear opinion irrespective of any rulings on the subject by this or by any other of the High Courts. But I have looked into all those printed for us in this case, and they all appear to me to have been correctly decided and to be in strict consistence with the opinion I have formed and stated in the present case, not even excepting the ruling by Pearson, J., and Turner, J., in *Chunia v. Ram Dial* (1), for in that case all that was prayed for was a mere declaration of right. The decision of the Privy Council of the 6th March, 1874, *Thakur Din Tiwary v. Nawab Syed Ali Husain* (2), as also the rulings by the Calcutta and Bombay High Courts are as satisfactory as they are to my mind conclusive.

PEARSON, J.—In the suit out of which this appeal has arisen it would seem that the plaint asked, not only for a declaration of

(1) I. L. R., 1 All. 360. (2) 24 W. R., 340.

the plaintiff's right to the property in question, but also for its protection or exemption from sale in execution of the defendant's decree. The latter prayer was, in my opinion, superfluous; for, if the plaintiff succeeded in obtaining a decree declaratory of his right, he could on the strength thereof apply to the Court executing the decree to release the property from attachment and to refuse to proceed to the sale thereof. As, however, he was so ill-advised in framing his suit as to pray for consequential relief which he did not need to obtain by means of the decree passed in the suit, it is impossible to hold that his suit is not one of the nature described under letter c, cl. iv., s. 7 of the Court Fees' Act. I confine my remarks to the particular case under reference, and refrain from noticing or commenting on the decisions to which our attention has been drawn. The distinction between suits under letter c, cl. iv., s. 7, and suits under cl. iii., art. 17, sch. ii. of the Act is plain; the former are suits for a declaratory decree where consequential relief is prayed; the latter are suits of the like kind where no consequential relief is prayed. There is no scope for argument in the matter.

SPANKIE, J.—I concur.

OLDFIELD, J.—I am of opinion that in this case, looking to the relief sought, there is a claim for consequential relief, and the court-fees should be levied under letter c, cl. iv., s. 7 of the Court Fees' Act.

STRAIGHT, J.—Plaintiff rightly estimated the nature of the relief she was seeking in her suit, by paying a court-fee of Rs. 60-12-0 in the first Court. It was not a mere declaration of her right at which she aimed, but she sought consequential relief as well. The defendant-appellant has therefore inadequately stamped his petition of appeal and he will have to make up the deficiency.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

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March 8.

EMPRESS OF INDIA v RAM KUAR.

*Buying or disposing of a person as a slave—Act XLV of 1860 (Penal Code), s. 370.*

R, having obtained possession of D, a girl about eleven years of age, disposed of her to a third person, for value, with intent that such person should marry her,

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and such person received her with that intent. *Held* that *R* could not be convicted of disposing of *D* as a slave under s. 370 of the Indian Penal Code. *Queen v. Mirza Sikundur Bukhut* (1) remarked upon.

THIS was a case called for by Spankie, J. under s. 294 of Act X of 1872 and subsequently referred by him to the Full Bench. The accused Ram Kuar had been convicted by Mr. W. C. Turner, Sessions Judge of Agra, of disposing of one Deoki as a slave, an offence punishable under s. 370 of the Indian Penal Code. The main facts upon which this conviction was based were as follows:—The accused, on a certain day, in the town of Agra, met Deoki, who was a married girl, aged about eleven years, and living with her uncle, and telling her that she would provide well for her, took her, against her will, to the house of one Udai Ram a *Jât* by caste. There the accused, alleging that Deoki was a *Jât*, whereas she was in fact a *Gararia*, disposed of her to Udai Ram's brother, with a view to marriage, for Rs. 4 and a buffalo. The following extract from the Sessions Judge's judgment contains the grounds upon which he convicted the accused under s. 370 of the Indian Penal Code: "Apparently by this section the traffio in all human beings is prohibited, and when the substance of the transaction is an attempt to give a property in the person and services of a human being, that person is disposed of as a slave within the meaning of this section, whatever force the parties to the transaction may attempt to give it. In the present case, it is clear that Ram Kuar took this young girl, who was at the time without protection, and, for a consideration, disposed of her to a *Jât*, knowing at the time that the girl was not by caste a *Jât* but a *Gararia*. Her conduct brings her within the meaning of this section"

The order referring the case to the Full Bench was as follows:—

SPANKIE, J.—Upon the facts found in this case I have come to the conclusion, as at present advised, that the conviction under s. 370 of the Penal Code ought not to be maintained. It cannot, I think, be said that there was in the transaction any buying or disposing of the girl as a slave. The section was not, in my opinion, intended to apply to such a case as the one before me. But I have

(1) H. C. R., N.-W P., 1871, p. 146.

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found a decision of a Bench of this Court, which, there can be no doubt, supports the view taken by the Sessions Judge in this case. The decision to which I refer will be found in the volume of this Court's Reports for 1871, and at p. 146,—*Queen v. Sikundur Bukhut*.

The learned Judges in that decision remarked that it was "urged that to constitute a person a slave, not only must liberty of action be denied to him, but a right asserted to dispose of his life, his labour, and his property. It is true that a condition of absolute slavery would be so defined, but slavery is a condition which admits of degrees. A person is treated as a slave if another asserts an absolute right to restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, or guardian, or a jailor. It appears to us that the appellant asserted a right to restrain the liberty of Musammat Paigya, and to dispose of her labour, and that she was detained in his house as a slave." In the present case the Sessions Judge seems to have had this judgment before him, and as it was the decision of a Divisional Bench (although at present I cannot agree that s. 370 meets either that or the case now before me), I am unwilling to dispose of the latter, without asking for the opinion of a Full Bench of the Court on the subject. I reserve for the present any expression of my reasons for thinking that s. 370 does not apply to the ordinary circumstances of kidnapping and disposing of young females to persons, either to be their wives or the wives of members of their families, or as mistresses, as the case may be. It is desirable that the case should be placed before the Court with as little delay as possible, as two cases in Criminal Revision are pending, which would be disposed of on my receiving the Full Court's judgment on the point submitted.

The following judgments were delivered by the Full Bench :

STUART, C. J.—The conviction in this case under s. 370, Indian Penal Code, cannot for a moment stand. The offence, if any, appears to have been one of kidnapping or abduction, but there is not a single element of the legal conception of slavery to be found under the facts. The Judge, in coming to his utterly mistaken conclusion

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that Deoki had been treated as a slave within the legal meaning of that status, was probably influenced by what I must call the extraordinary ruling by a Bench of this Court in the case of *Queen v. Mirza Sikundur Bukhut* (1). That was indeed really a much stronger case than the present, and yet it too was obviously a case not of slavery but of kidnapping or abduction. It is exceedingly difficult to understand what is meant by s. 370, Indian Penal Code. That section provides that "whoever imports, exports, removes, buys, sells, or disposes of, any person as a slave, or accepts, receives, or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine." This appears to assume the condition of slavery as a possible fact within the cognizance of the law, but such a condition is as much ignored by the law of this country as it is by the law of England. A slave is a creature without any rights or any status whatsoever, who is or may become the property of another as a mere chattel, the owner having absolute power of disposal by sale, gift, or otherwise, and even of life or death, over the slave, without being responsible to any legal authority. Such is the determinate and fixed condition of the slave, and it is not, as ruled in the above case, a condition capable of degrees.

But such a position for any human being under the Government of India was utterly repudiated by an Act passed in 1843, Act V of 1843, entitled, "An Act for declaring and amending the law regarding the condition of slavery within the territories of the East India Company." And the Act, which is a short one, containing only four brief sections, provides as follows:—1. "No public Officer shall, in execution of any decree or order of Court, or for the enforcement of any demand of rent or revenue, sell or cause to be sold, any person, or the right to the compulsory labour or services of any person, on the ground that such person is in a state of slavery." 2. "No rights arising out of an alleged property in the person and services of another as a slave shall be enforced by any Civil or Criminal Court or Magistrate within the territories of the East India Company." 3. "No person who may have acquired property

(1) H. C. B., N.-W. P., 1871, 146.

by his own industry or by the exercise of any art, calling or profession, or by inheritance, assignment, gift or bequest, shall be dispossessed of such property or prevented from taking possession thereof on the ground that such person or that the person from whom the property may have been derived was a slave."

4. "Any act which would be a penal offence if done to a free man shall be equally an offence if done to any person on the pretext of his being in a condition of slavery." There is by this Act a thorough repudiation by the law of India not only of the condition of slavery as a possible state of things, but of any rights or interests or estate which could be asserted in respect of it, and therefore, as I have said, it is exceedingly difficult to understand what is meant to be intended by s. 370, Indian Penal Code. The actual accomplishment of placing a human being in the condition of a slave could not have been contemplated, inasmuch as the possibility of accomplishing anything unknown to the law cannot be supposed to have been meant or intended; s. 370 therefore can only be understood as directed against attempts to place persons in the position of slaves, or to treat them in a way that is inconsistent with the idea of the person so treated being free as to his property, services, or conduct, in any respect.

Here the girl Deoki appears simply to have been enticed away by the accused Ram Kuar for the purpose of a marriage, which owing to an objection on the score of caste did not take place, and she was sent back to Ram Kuar. Whether in any case the marriage could have been carried out must be more than doubtful, as she herself states she had previously been married to Nangha, a fact which in all probability was not known at the time to Ram Kuar. But, whether that be so or not, it is perfectly clear that on the facts there is not the slightest pretence for holding that any offence whatever under s. 370 was committed.

PEARSON, J.—It is apparent upon the surface of the case that Deoki was sold to Udai Ram's brother and purchased by him not as a slave but for the purpose of becoming his wife. I therefore concur with the learned Judge who made the reference to the Full Bench in the opinion that the conviction of Ram Kuar under

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s. 370, Indian Penal Code, cannot be maintained. But I do not think that the decision of this Court in *Queen v. Mirza Sikundur Bukhut* (1) affords any support to the view taken by the Sessions Judge in this case.

SPANKIE, J.—I am still of the same opinion as I was when I referred the case, that s. 370 of the Penal Code does not meet it.

The Sessions Judge makes the following observations in his judgment: "Apparently by this section (370) the traffic in all human beings is prohibited, and when the substance of the transaction is an attempt to give a property in the person and services of a human being, that person is disposed of as a slave within the meaning of this section, whatever force the parties to the transaction may attempt to give it."

The precedent of this Court (1), to which I refer in submitting the case to the Full Bench, appears to me to support this view. The learned Judges say that a person is treated as a slave if another asserts an absolute right to restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, or guardian, or jailor. This doubtless is so. But the Judges go further and say: "The offence of which the appellant has been convicted is one of which instances are not uncommon in this country. Children are purchased from their parents or strangers, and are brought up as domestic servants, having little or no personal liberty conceded to them. These children are practically slaves, and it cannot be too widely known that their condition is such as will not be tolerated by English law, and that persons who detain them in their houses are liable to punishment under the Penal Code."

I have examined the records of Government with a view to ascertain the circumstances under which the section was framed.

In the draft Penal Code published by command in 1837, in the chapter on kidnapping, except in cl. 357, now represented by s. 367, there is no reference to slavery. The report, however, of the

(1) H. C. R., N.W. P., 1871, p. 146.

Commissioners recognizes slavery as existing. They say that they had collected information on the subject from every part of India, and that the documents collected have satisfied them that there is at present no law whatever defining the extent of the power of a master over his slaves, that every thing depends on the disposition of the particular functionary who happens to be in charge of a district, and that functionaries who are in charge of contiguous districts, or who have at different times been in charge of the same district, hold diametrically opposite opinions as to what their official duty requires. The result was that the Law Commissioners recommended to the Governor-General in Council that no act falling under the definition of an offence should be exempted from punishment because it was committed by a master against a slave.

It may be thought, they say, that by framing the law in this manner they do in fact virtually abolish slavery in British India. But their object was to deprive slavery of those evils which are its essence, and to do so would ensure the speedy and natural extinction of the whole system. "The essence of slavery," they observe, "the circumstance which make slavery the worst of all social evils, is not in our opinion this, that the master has a legal right to certain services from the slave, but this, that the master has a legal right to enforce the performance of those services without having recourse to the tribunals."

The Hon'ble Court of Directors in 1838 directed that the Government of India should lose no time in passing an enactment to the effect of the recommendation just referred to. The majority of the Commissioners framed a draft Act, but Mr. Cameron differed from them, and afterwards the Commissioners again differed amongst themselves in submitting another report on the subject in 1841. At last in 1843 Act V of that year was passed which carried out the original recommendation of the Law Commissioners. The first section forbade the public sale by any public officer in execution of any decree or order of Court, or for the enforcement of any demand of rent or revenue, of any person, or of the right to the compulsory labour or services of any person on the ground that such person is in a state of slavery. S. 2

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declared that no rights arising out of an alleged property in the person and services of another as a slave shall be enforced by any Civil or Criminal Court or Magistrate within the territories of the East India Company. S. 3 provides that no person shall be deprived of any property whatsoever, however obtained, on the ground that such person or that the person from whom the property may have been derived was a slave. S. 4 enacted that any act which would be a penal offence if done to a free man shall be equally an offence if done to any person on the pretext of his being in a condition of slavery.

After this in 1846 the Indian Law Commissioners again submitted a report on the Penal Code. In clauses 426 to 438 of their report, the Commissioners refer to kidnapping and sale of children. In cl. 435 they refer to Act V of 1843, and observe that the private sale of a free person for the purpose of being dealt with as a slave is not prohibited by this law. But as, under s. 4 of it, no person so sold could be dealt with as a slave against his will, it amounts to a virtual prohibition which may be effectual as regards adults who can avail themselves of the law, without any further provision. But with respect to children, it should be made penal to sell or purchase a child under any circumstances. I can obtain no clue to what happened after this report. This recommendation in the report of 1846 appears to have borne fruit, for ss. 370 and 371 were prepared.

Looking at the former law, V of 1843, and specially at s. 4, I conclude that, so far as we are concerned in the case referred to, it would be necessary for the prosecution to show that the prisoner Ram Kuar asserted a right to dispose of the girl's liberty, and under pretext of her being a slave sold her as such and to continue such. The case before us does not present any such features. The section, therefore, does not apply.

The observations of the learned Judges in the latter part of the judgment in *Queen v. Mirza Sikundur Bukhut* (1) appear to me to go beyond the section. Ss. 365, 366, 367, 368, 372 and 373 seem to provide for the cases of kidnapping children, whilst s.

(1) H. C. R., N.-W. P., 1871, p. 146.

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374 declares that any one who unlawfully compels any person to labour against his will shall be punished with imprisonment of either description for a term which may extend to one year or with fine or with both. But s. 370 must be read as providing for the specific offence which it includes, *i. e.*, (i) the importation and exportation of a person as a slave; (ii) the disposal of a person as a slave (and here the presumption is that the act is against the will of the person); (iii) the acceptance, reception or detention of any person against his will as a slave, that is, it must be shown that the act done was done against the will of the person, who cannot be accepted, received or detained as a slave. When these conditions are not seen in any case, s. 370 does not appear to me to apply.

OLDFIELD, J.—I apprehend that the sections of the Penal Code with which this reference deals were enacted for the suppression of slavery, not only in its strict and proper sense, *viz.*, that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another.

Slavery had the sanction of the Muhammadan and Hindu laws; and a form of slavery was prevalent in this country at the commencement of our rule, and Mr. Justice Spankie, whose written opinion on this reference I have had the advantage of reading, has abundantly shown that the law we are dealing with was enacted to suppress that practice.

To bring the act of the accused in the case before us within the meaning of s. 370, there must be a selling or disposal of the girl as a slave, that is, a selling or disposal whereby one who claims to have a property in the person as a slave transfers that property to another.

But the facts in this case do not show any thing of the kind; no such right of property in the girl appears to have been set up by the accused. The girl appears to have come under the protection of accused when in a state of destitution, and she was given

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over to Udai Ram in order that she might become his brother's wife, the accused receiving a gratification for her trouble. The facts do not, therefore, appear to me to constitute an offence under s. 370.

STRAIGHT, J.—Upon the facts as disclosed in the judgment of the Sessions Judge, I am of opinion that the conviction of Ram Kuar under s. 370 of the Penal Code cannot be sustained. There is no sufficient evidence that the girl Deoki was “sold or disposed of” to the brother of Udai Ram for the purpose of her being dealt with as a slave, or, in other words, that a right of property in and over her should be asserted by her purchaser in employing her in menial and enforced services against her will and by restraining her liberty. On the contrary, the proof appears to be, that the Rs. 4 and the buffalo were given by Udai Ram's brother under the belief that Deoki was a *Jât*, and his admitted object and intention in reference to her was marriage. Moreover, the moment it was discovered she was a *Gararia*, Udai Ram started to take her back to Ram Kuar and was only prevented from doing so by his arrest. Under all the circumstances, I think that the decision of the Sessions Judge should be set aside.

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March 11.

## APPELLATE CIVIL.

*Before Mr. Justice Spinkie and Mr. Justice Straight.*

PURAN MAL AND OTHERS (PLAINTIFFS) v. PADMA (DEFENDANT).<sup>a</sup>

*Rent-free grant—Jurisdiction—Act XVIII of 1873 (N.-W. P. Rent Act), ss. 30, 95 (c)—Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 79, 241 (h)*

The plaintiffs in this suit, zamindars of a certain village, sued for the possession of certain land in such village, alleging that it had been assigned to a predecessor of the defendant to hold so long as he and his successors continued to perform the duties of village-watchman, and the defendant had ceased to perform those duties, and was holding as a trespasser. The defendant set up as a defence to the suit that he and his predecessors had held the land rent-free for two hundred years, and that he held it as a proprietor. *Held* that such assignment was not a grant within the meaning of Regulation XIX of 1793, and the plaintiffs' claim was

Second Appeal, No. 1029 of 1879, from a decree of Maulvi Maqsood Ali Khan, Subordinate Judge of Agra, dated the 6th June, 1879, affirming a decree of Maulvi Munir-ud-din, Munsif of Jalesmar, dated the 26th March, 1879.

not one to resume such a grant or to assess rent on the land, of which a Revenue Court could take cognizance under ss. 30 and 95 (c) of Act XVIII of 1873 or ss. 79 and 241 (h) of Act XIX of 1873, but one which was cognizable by the Civil Courts.

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THIS was a suit for the possession of five bighas, nine biswas, of land situate in Thoke Sundar Lal, mauza Chedermi, pargana Firozabad, Agra district. The plaintiffs, who were zamindars of the village, claimed such land on the ground that it had been granted to a predecessor of the defendant in consideration of his services as “*balahar*” or village-watchman, and the defendant had ceased to perform those services. The defendant set up as a defence to the suit that he and his predecessors had held the land rent-free for two hundred years, that he held the land as a proprietor, and that the suit was not cognizable by the Civil Courts. The Munsif and the Subordinate Judge concurred in holding that the suit was not cognizable by the Civil Courts, the matter in dispute being in their opinion the resumption of a rent-free grant of land, and one therefore on which an application might have been made to a Revenue Court, under s. 30 of Act XVIII of 1873, or s. 79 of Act XIX of 1873.

On appeal by the plaintiff to the High Court it was contended that the claim was not one for the resumption of a rent-free grant of land, within the meaning of those sections, but one for the possession of land which had been given to the defendant for the performance of services which he had ceased to perform, and the suit was consequently cognizable by the Civil Courts.

*Munshi Hanuman Prasad*, for the appellants.

*Maulvi Obeidul Rahman*, for the respondent.

The following judgments were delivered by the Court :

SPANKIE, J.—I have considered the appellants’ plea and have come to the conclusion that the finding of the Courts below, that the suit is not cognizable in the Civil Courts, is incorrect. The grants referred to in s. 30, Act XVIII of 1873, and in s. 79, Act XIX of 1873, are those set forth in the preamble of Regulation XIX of 1793, and in the first section thereof. That section recites

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that, by the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every bigha of land (demandable in money or kind, according to local custom), unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, while he continues to discharge the latter. As a necessary consequence of this law, if a zamindar made a grant of any part of his lands to be held exempt from payment of revenue, it was considered void, from being an alienation of the dues of Government without its sanction. There the grants referred to are those made by the zamindar. *Badshahi* or royal grants are excepted in the preamble. The grant referred to is a permanent alienation of revenue, or, as Acts XVIII and XIX, in ss. 30 and 79 respectively, term it, rent. The first section of Regulation XIX of 1793 further indicates the nature of the grants as having been made under the pretext that the produce of the lands was to be applied to religious or charitable purposes. Of these grants some were applied to the purposes for which they were professed to have been made, but, in general, they were given for the personal advantage of the grantee, or with a view to the clandestine appropriation of the produce to the use of the grantor, or sold to supply his private exigencies. All such grants since the 1st December, 1790, and in future, were declared null and void by s. 10 of the Regulation.

What the plaintiff desires in this case is full possession of a plot of land which he says has hitherto been held without payment of rent by defendant, the village "*balahar*" or watchman. He was allowed to occupy the land for his support, and in point of fact whatever he derived from the land constituted his wages. But there was no permanent grant of the land to him or his predecessors. He would continue to occupy it as long as he continued to give his services as watchman. Obviously such an assignment is not a grant within the meaning of Regulation XIX of 1793, and the present claim is not one to resume such a grant or to assess the rent on the land. The settlement officer therefore very properly refused to entertain the claim. Nor could an application to dispossess the

defendant be made to the Collector under letter (c), s. 95, and s. 30, Act XVIII of 1873, for the same reason. It is not a claim to recover a rent-free grant as being one of those declared by the Regulation to be null and void, nor is it a claim to assess the rent on the land.

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The plaintiff wishes the defendant to give up the land or pay rent. The defendant repudiates the plaintiff's superior title, and claims that he has acquired a proprietary right in the plot which has been in the possession of himself and his family for two hundred years. Clearly there is a dispute between the parties which it is the special duty of the Civil Courts to determine. The plaintiff now regards the defendant, who is no longer watchman, as a trespasser; the latter asserts his full proprietary right in the plot. The Courts below are bound to determine the party to whom the right belongs and to decide the case on all its merits.

I would therefore decree the appeal, reverse the decision of the lower appellate Court, and remand the case for trial on the merits by that Court, should it find materials on the record to enable it to do so; but if it should appear that the first Court has excluded evidence of fact essential to the determination of the rights of the parties, the lower appellate Court is at liberty to reverse the decree of the first Court. Costs to abide the result of a new trial.

STRAIGHT, J.—I concur fully in the above judgment of my honorable colleague.

*Cause remanded*

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*Before Mr. Justice Spankie and Mr Justice Straight.*

MAEKUNDI DIAL (PLAINTIFF) v. RAMBARAN RAI AND ANOTHER  
(DEFENDANTS).\*

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1880  
March 15.

*Sale of proprietary rights in a Mahál—Right of occupancy—Ex-proprietary tenant—  
Act XVIII of 1878 (N.-W. P. Rent Act), ss. 7, 9.*

The right of occupancy which a person losing or parting with his proprietary rights in a mahál acquires, under s. 7 of Act XVIII of 1873, in the land held by him as sár in such mahál at the date of such loss or parting, is a saleable interest.

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\* Second Appeal, No. 997 of 1879, from a decree of Maulvi Muhammad Bakhsh. Additional Subordinate Judge of Ghazipur, dated the 22nd May, 1879, modifying a decree of Maulvi Mir Badshah, Munsif of Saidpur, dated the 17th February, 1879.



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*Held*, where such a right was sold by private sale, that it was transferable, s. 9 of Act XVIII of 1873 notwithstanding. *Umrao Begam v. The Land Mortgage Bank of India* (1) followed.

A deed executed by a village proprietor purporting to transfer his share in the village including his sir-land and ex-proprietary right divests such proprietor of the ex-proprietary right conferred by s. 7 of Act XVIII of 1873.

THE plaintiff claimed nineteen bighas, two biswas, of land, under a deed of sale dated the 9th April, 1878. At the time of the sale this land was held by the defendants as sir-land. The deed of sale purported to transfer the share of the defendants in a certain mahál including their "sir-land" and their "ex-proprietary rights." The plaintiff alleged that the defendants were holding the land as trespassers. The defendants set up as a defence to the suit that they held the land under a right of occupancy in virtue of the provisions of Act XVIII of 1873; that they did not acquire such right until after the date of the sale to the plaintiff, and therefore such right did not pass under that sale; that, under s. 9 of Act XVIII of 1873, such right was not transferable; and that the suit was not cognizable by the Civil Courts. The Court of first instance allowed their contention, and, holding that the suit was not cognizable by the Civil Courts, returned the plaint to the plaintiff to be presented in a Court of Revenue. On appeal by the plaintiff the lower appellate Court held that the suit was cognizable by the Civil Courts, but dismissed it on the ground that the defendants held the land as occupancy-tenants and not as trespassers, and could not be dispossessed, holding that, inasmuch as the defendants only acquired the right of occupancy under s. 7 of Act XVIII of 1873 after the date of the sale of their share, that right did not pass under that sale to the plaintiff, and further that that right, under s. 9 of that Act, was not transferable.

The plaintiff appealed to the High Court, contending that the defendants were competent to transfer their occupancy-rights as ex-proprietary tenants, and having transferred such rights to her, she was entitled to the possession of the land in suit.

Munshi *Hanuman Prasad*, for the appellant.

(1) I. L. R., 2 All. 451.

The *Senior Government Pleader* (Lala Juala Prasad), for the respondents.

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The following judgments were delivered by the Court :

SPANKIE, J.—The defendant, as lambardar, sold his share including the “sír” and “ex-proprietary rights” to the plaintiff. The lower appellate Court holds that he could not dispose of the ex-proprietary right, as it had not accrued until the defendant had transferred his share in the estate to the plaintiff.

The wording of s. 7, Act XVIII of 1873, is to the following effect, “that every person who may hereafter lose or part with his proprietary rights in any mahál shall have a right of occupancy in the land held by him as sír in such mahál at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants at will for land of similar advantages.” The second paragraph goes on to say that “persons having such rights of occupancy shall be called ex-proprietary tenants and shall have all the rights of occupancy-tenants.”

It is true that the general rule is that the subject of sale must belong to the vendor and that he can sell no more than the interest which he legally possesses. But it appears to me that s. 7 of the Act recognizes from the date of its passing that a proprietor has a right of occupancy in land held by him as “sír,” and reserves it to him, if he pleases, upon the terms provided by the section. The vendor was at liberty to sell his sír-land, and I do not think that s. 7 debars him from selling the interest reserved to him by the Act, namely, the right to occupy the land at a favourable rate of rent. This seems to me to be an interest created from the date of the passing of Act XVIII of 1873, and an expectancy which he might dispose of along with the sír and his proprietary share. It also seems to me that it is erroneous to refer to the right as that of an “ex-proprietary tenant.” Persons who have such rights of occupancy as those described in s. 7 *shall be*, the Act says, *called* ex-proprietary tenants and shall have all the rights of occupancy tenants. They are so called to distinguish them from the occupancy-tenants described in s. 8. What s. 7 recognizes is a right

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of occupancy that has always perhaps been inherent in the proprietor of a share, a right to occupy a portion of the lands as his sir, either for his own cultivation, or to sublet them to others. Whether this be so or not, that he has a recognized interest in the right to occupy the land held by him as sir, in the event of his losing or parting with his proprietary rights in the mahál, would appear to be quite clear. How far the second paragraph of s. 9 of the Rent Act would invalidate such a sale of the occupancy-right, as being contrary to law and policy, is another matter, which might have required fuller consideration. But I feel myself bound by the ruling of the Full Bench in *Umrao Begam v. The Land Mortgage Bank of India* (1), from which, however, I dissented. I am of opinion that the appeal should be decreed and that the case should go back to the lower appellate Court to be tried on the merits.

STRAIGHT, J.—I have had some doubt as to the proper construction to be put upon s. 7 of the Rent Act, but after very careful consideration, I agree with the view of Mr. Justice Spankie as stated in his judgment. I may add, that like him I feel bound by the decision of the Full Bench (1) referred to, though were the matter still an open one, I should hold the prohibition of s. 9 of the Rent Act to apply strictly.

*Cause remanded.*

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February 2.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

NARAINI KUAR (DEFENDANT) v. DURJAN KUAR AND OTHERS (PLAINTIFFS)\*

NARAINI KUAR (DEFENDANT) v. PIAREY LAL AND OTHERS (PLAINTIFFS)\*.

*Addition of parties—Act X of 1877 (Civil Procedure Code), s. 32.*

*Held*, reading ss. 28, 29, and 32 of Act X of 1877 together, that, where an application is made under s. 32 for the addition of a person whether as plaintiff or defendant, such person should, as a general rule, be added, only where there are questions directly arising out of and incidental to the original cause of action, in which such person has an identity or community of interest with the original plaintiff or defendant.

(1) I. L. R., 2 All., 451.

\* First Appeals, Nos. 101 and 102 of 1879, from orders of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 4th July, 1879.

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Two suits against *K* for possession of the property of *B*, deceased, were instituted in the Court of a Subordinate Judge by parties claiming adversely to one another as heirs to *B*. The Subordinate Judge, on the applications of the plaintiffs in these suits, under s. 32 of Act X of 1877, added the plaintiffs in the first suit as defendants in the second, and the plaintiffs in the second suit as defendants in the first. *Held*, on appeal by the defendant *K* from the orders of the Subordinate Judge, applying the rule stated above, that such additions of parties, not being necessary to enable the Subordinate Judge "effectually and completely to adjudicate upon and settle all the questions involved in the suits," were not proper.

The principles on which s. 73 of Act VIII of 1859 should be interpreted enunciated by Sir Barnes Peacock in *Joy Gobind Doss v. Gouree Prashad Shaha* (1), *Raja Ram Tewary v. Luchman Pershad* (2), and *Ahmed Hosain v. Khodeja* (3), and the remarks of Pontifex, J. in *Mahomed Badhsa v. Nicol* (4) followed and applied.

WHILE two suits against one Naraini Kuar numbered respectively 63 and 76 were pending in the Court of the Subordinate Judge of Bareilly, the plaintiffs in suit No. 63 applied, under s. 32 of Act X of 1877, to be made defendants in suit No. 76, and the plaintiffs in suit No. 76 applied, under the same section, to be made defendants in suit No. 63. On the 4th July, 1879, the Subordinate Judge passed orders granting these applications. In each case the application was granted on the ground that a suit by the applicants in the other case against Naraini Kuar relating to the same property was pending. Naraini Kuar appealed against these orders to the High Court.

Mr. Hill, for the appellant.

Mr. Conlan, Munshi *Hanuman Prasad*, and Pandit *Bishambhar Nath*, for the respondents in No. 101.

Mr. Colvin and Pandit *Bishambhar Nath*, for the respondents in No. 102.

The judgment of the Court (PEARSON, J., concurring) was delivered by

STRAIGHT, J.—These are first appeals from two orders, passed by the Subordinate Judge of Bareilly, on the 4th of July, 1879.

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(1) 7 W. R., 202.  
(2) 8 W. R., 15.

(3) 10 W. R., 369 ; 3 B. L. R., A. C., 28.  
(4) 1 L. R., 4 Calc., 355.

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In order to make the question of law raised on behalf of the appellant intelligible it is necessary to recapitulate the following facts.

It appears that two suits are pending in the Court of the Sub-ordinate Judge against one Naraini Kuar. In the first of these the plaintiffs are Rani Durjan Kuar, Chandi Din, and Mashuk Mahal Sahiba Begam, and in the second Piarey Lal, Bhairon Prasad, Shib Lal, and Narbada Prasad. The litigation relates to the ancestral property of Chaudhri Basant Ram, deceased. The three plaintiffs in case No. 1 sue for possession of the property by right of inheritance,—Rani Durjan Kuar as widow of Basant Ram and step-mother of Chaudhri Naubat Ram, his son, also deceased; Chandi Din as grandson of Basant Ram and sister's son of Naubat Ram; and Mashuk Mahal Sahiba Begam as vendee of a portion of the property in suit from the other two plaintiffs, under a sale deed of the 17th of February, 1879. In case No. 2 the four plaintiffs, alleging themselves to be the nearest heirs of the deceased Naubat Ram, sue for proprietary possession, by cancelment of an order of the 15th August, 1879, declaring Naraini Kuar to be the owner of the property in suit and directing the entry of her name, in that character, in the *khewat*. To both suits the defendant replies, that she is entitled to the property by virtue of the adoption of her deceased husband, Raghunandan Prasad, by Naubat Ram. It is admitted that she is in possession, and that her name is entered in the revenue records. The two complaints were filed respectively, in the first case, on the 17th April, and, in the second, on the 12th May, 1879. The pleas of the defendant were put in on the 4th of July. Upon that day application was made, under s. 32 of Act X of 1877, by both sets of plaintiffs, praying that they might be added as defendants in that suit in which they were not plaintiffs, and thereupon the orders now appealed were passed.

It is objected before us on behalf of the original defendant, Naraini Kuar, that these orders are irregular and illegal; that the Sub-ordinate Judge has misinterpreted the provisions of s. 32 of Act X; that he has improperly exercised the discretion vested in him under that section; and that it is inequitable that the defendant should be hampered and embarrassed in the conduct of her case, by being placed between a cross-fire of adverse claims,

those of the plaintiffs on the one hand and of the defendants on the other.

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The question thus raised is one of much importance, as to the procedure and practice contemplated by s. 32. The substantial point for determination appears to be, has the Subordinate Judge, having regard to the permissive character of s. 32, properly, that is, within the terms of the section, exercised his discretion in passing the two orders appealed.

No doubt it is most desirable, when litigation has been instituted in respect of a particular subject-matter or specific contract, that the Court having cognizance of it should see that all questions directly springing out of it should be raised and dealt with once and for all, and that all persons naturally concerned in and likely to be legally affected by the determination of those questions should be joined as parties. The practice of the English Equity Courts has always been to recognise this principle in its widest aspect, and the Orders under Rule XVI of the Judicature Act afford abundant facilities for the joinder of parties. It is noticeable that their language, with slight exception, is repeated word for word in the earlier sections of the 3rd chapter of the Civil Procedure Code, though it is worthy of observation that the provisions of Orders 17 and 19, as to adding persons from whom a defendant claims contribution or indemnity, or others whom the Court or Judge thinks should be joined for the purpose of a question being determined, not only as between the plaintiff and defendant, but between them and such other person, have not been incorporated. While the propriety of preventing unnecessary and expensive repetition of litigation and multiplication of suits cannot be questioned, neither as a principle of justice to litigants nor as a convenient rule of practice can an indiscriminate joinder either of causes of action or of parties be tolerated.

It becomes necessary to closely examine not only the terms of s. 32, but also the kindred provisions in the earlier part of chapter III, which now replace the legislation formerly contained in s. 73 of Act VIII of 1859. First as to s. 32, the Court may at any time, either upon or without application, "order that any plaintiff be made a defendant or that any defendant be made

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a plaintiff, and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suits, be added." But it seems to me that, in exercising the very wide discretion given by these later words, regard should be had to the terms of ss. 28 and 29, and the test as to the joinder of defendants should be whether the relief sought is "in respect of the same matter," or the liability alleged to exist relates to "any one contract."

Now let us see how the language of these sections is applicable to the cases under consideration. So far as the two sets of plaintiffs are concerned, it is obvious that their claims are altogether adverse, and that, as between them, there is a question of priority of heirship to be decided, in which Naraini Kuar, the original defendant, has no actual interest. It is true that the property to which they both assert a title is one and the same, but I do not think that this circumstance justifies the orders of the Subordinate Judge. Apart from all questions of inconvenience or embarrassment to the principal defendant in the conduct of her defence, should she fail to establish the adoption on which the whole fabric of her case rests, I do not see how, as between the plaintiffs and the joined defendants, no matter in which case, any decision that can be passed will estop either of them from subsequent assertion of their rights against one another in a separate suit. It does not appear to me that the plaintiffs in either case could have joined the other plaintiffs in their original plaint as defendants, for they sought no relief against them, and the relief they did seek against Naraini Kuar was not in the sense of s. 28 in respect of "the same matter." The joinder of the two sets of plaintiffs, as defendants, in accordance with the order of the Subordinate Judge, can only be reasonable, if they are to be equally bound by the decree in one suit, not only as to the principal defendant, but as between themselves; and it is only in this sense that "their presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit." But the question involved in each suit is not what are the rights of the two

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sets of plaintiffs *inter se*; the issue to be decided between the defendant Naraini Kuar and each set of plaintiffs is perfectly plain and intelligible, and, as she is in possession, the burden of proof will be on those who assail her title. Necessarily all the plaintiffs are interested in the determination of the "adoption," set up by the principal defendant, but, as I have already remarked, I do not see how a finding upon this point in either suit can bind the joined defendants to the plaintiffs or the plaintiffs to the joined defendants, in respect of their mutual claims between one another to the property, or in the event of the principal defendant establishing the adoption in one case can obviate a second trial. No plea of *res judicata* could be sustained. Upon the argument before us Mr. Hill for the appellant called our attention to three lengthy judgments of Sir Barnes Peacock—*Joy Gobind Doss v. Gouree Prashad Shaha* (1,; *Raja Ram Tewary v. Luchmun Pershad* (2); *Ahmed Hosain v. Khodeja* (3)—which are valuable and instructive. For though these were given upon cases arising under s. 73 of Act VIII of 1859, the reasoning and principles of interpretation enunciated may appropriately be followed in construing s. 32, Act X of 1877. Under s. 73, Act VIII of 1859, the Court had power to join "all parties who may be likely to be affected by the result," an expression that might be taken to mean a great deal more than was ever intended by the legislative authorities, and which Sir Barnes Peacock in the judgments already adverted to was careful to qualify and reduce within intelligible limits. But now reading, as I think one should, ss. 28, 29 and 32 of Act X together, the terms "questions involved in the suit" must be taken to mean questions directly arising out of and incident to the original cause of action, in which, either in character of plaintiff or defendant, the person to be joined has an identity or community of interest with that party in the litigation on whose side he is to be ranged. I do not lay this down as an irrefragable rule by which applications under s. 32 of Act X should be determined; for cases may arise similar to *Saroda Pershad Mitter v. Kylash Chunder Banerjee* (4) and *Kali Prasad Singh v. Jainarayan Roy* (5); but in the multi-

(1) 7 W. R. 202.

(2) 8 W. R. 15.

(3) 10 W. R. 368; 3 B. L. R., A. C., 28.

(4) 7 W. R. 315.

(5) 3 B. L. R., A. C., 23.



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tude of instances it will be a useful test to apply in deciding whether the presence of parties is necessary to enable the Court "effectually and completely to adjudicate and settle the questions involved in the suit." I entirely agree with the remarks of Pontifex, J. in *Mahomed Balsha v. Nicol* (1), and applying them in the present cases, it appears to me that the joinder of the two sets of plaintiffs as defendants was not necessary to enable the Court effectually and completely to settle the question arising between the plaintiffs and Naraini Kuar in the respective suits. I, therefore, think that the Subordinate Judge improperly passed the two orders of the 4th of July and that these appeals must be allowed with costs. The defendants who have been added to the record will be struck off, their statements of defence returned to them, and the plaints restored to their original shape.

*Appeals allowed.*

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

1880  
February 13.

PARSHAUL LAL (DEFENDANT) v. RAM DIAL (PLAINTIFF).\*

*Suit for Pre-emption—Deposit of purchase-money—Appellate Court, powers of—  
Act X of 1877 (Civil Procedure Code), s. 214.*

The decree of the Court of first instance in a suit to enforce a right of pre-emption directed that the sum which that Court had ascertained to be the purchase-money should be deposited within one month from the date of the decree. The plaintiff appealed, contending that such sum was not the purchase-money. While the appeal was pending the time fixed by the decree of the Court of first instance expired without any deposit having been made. The appellate Court dismissed the appeal, fixing by its decree, of its own motion, a further time for the deposit. *Held*, following *Shoo Prasad Lal v. Thakur Rai* (2), that the appellate Court was competent to extend the time for making the deposit, and its action and order did not contravene the provisions of s. 214 of Act X of 1877.

THIS was a suit to enforce a right of pre-emption in which the plaintiff alleged that the purchase-money was Rs. 600, and not Rs. 800 as entered in the deed of sale. The Munsif determined

(1) I. L. R., 4 Calc., 355.

\* Second Appeal, No. 943 of 1879, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 29th May, 1879, affirming a decree of Babu Sanwal Singh, Munsif of Etawah, dated the 14th December, 1878.

(2) H. C. R., N.-W. P., 1868, p. 254.

that the plaintiff was entitled to pre-emption, but found that the purchase-money was Rs. 800, and gave the plaintiff a decree dated the 14th December, 1878, which directed him to deposit the purchase-money, Rs. 800, within one month from the date of the decree, and that in default the decree should be considered null and void. The plaintiff appealed from this decree, and the Subordinate Judge on the 29th May, 1879, finding that the purchase-money was Rs. 800, made a decree dismissing the appeal, and directing the plaintiff to deposit the purchase-money within one month from the date the decree became final.

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The defendant appealed to the High Court, contending that the Subordinate Judge "was not competent, in the absence of any objection in appeal, to modify the decree of the Court of first instance as regards the time within which the plaintiff had been directed to pay the purchase-money;" and "that, as the plaintiff failed to conform to the decree of the Court of first instance as regards the deposit of the purchase-money and took no exception in his appeal as regards the time fixed by that decree for the deposit, his suit should be held liable to dismissal as prescribed by s. 214 of Act X of 1877."

Pandit *Bishambhar Nath* and Munshi *Kashi Prasad*, for the appellant.

Munshi *Hanuman Prasad* and Lala *Lalta Prasad*, for the respondent.

The judgment of the Court (PEARSON, J., and SPANKIE, J.,) was delivered by

PEARSON, J.—The grounds of appeal are overruled by the Full Bench decision in *Sheo Prasad Lal v. Thakur Rzi* (1), and it does not appear to us that the appellate Court's action and order contravened the provisions of s. 214, Act X of 1877. The appeal is dismissed with costs.

*Appeal dismissed.*

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(1) H. C. R., N.-W. P., 1868, p. 254.

1880  
February 19.

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

DEVA SINGH (PLAINTIFF) v. RAM MANOHAR AND ANOTHER (DEFENDANTS)\*

*Hindu Law—Mitakshara—Mortgage by father of joint ancestral property—Sale of joint ancestral property in the execution of a decree against father—Liability of Son's share.*

The undivided estate of a joint Hindu family consisting of a father and his sons, while in the possession and management of the father, was mortgaged by him, with the knowledge of the sons, as security for the re-payment of moneys borrowed and lent for the use and benefit of the family. The lender of these moneys sued the father to recover them by the sale of the family estate, and obtained a decree against him directing its sale, and sought to bring the family estate to sale in the execution of this decree. *Held*, in a suit by one of the sons to protect his share in such estate from sale in the execution of such decree, that such decree could not be regarded as against the father only, and his share in such property was not alone saleable in execution of it, but such suit and decree must be regarded as against the father as representing the joint family, and the whole of the family estate was saleable in the execution of such decree. *Bissessur Lall Sahon v. Luckmessur Singh* (1) followed. *Deendyal Lall v. Jugdeep Narain Singh* (2) distinguished.

THIS was a suit, instituted in the Court of the Munsif of Balia, zila Ghazipur, to establish the plaintiff's proprietary right to a one-seventh share of certain zamindari shares of four villages called severally Koel, Narainpur, Lakhmi Pab, Kharauli, and Mahatpal, situated in that zila. These shares had been attached in execution of a decree against the plaintiff's father, the defendant Sheo Narain Singh, dated the 6th July, 1877, held by the defendant Ram Manohar. The plaintiff objected to this attachment, claiming that a one-seventh share of the property was his and should be excluded from attachment and sale, but his objection was disallowed, and he accordingly brought the present suit to establish his claim. The plaintiff stated in his plaint that these zamindari shares were joint ancestral property in which his share according to Hindu law was one-seventh; the share of the remaining four sons of the defendant Sheo Narain Singh four-sevenths, the share of the wife of that defendant one-seventh, and the share of that defendant himself one-seventh; that each member of the family

\* Second Appeal, No. 793 of 1879, from a decree of Maulvi Mahmud Bakhsh, Additional Subordinate Judge of Ghazipur, dated the 22nd March, 1879, affirming a decree of Maulvi Kamar-ud-din, Munsif of Balia, dated the 13th December, 1878.

(1) L. R., 6 Ind. Ap., 233; 5 Calc. (2) I. L. R., 3 Calc., 198.  
L. R., 477.

as a member of a joint and undivided Hindu family was in the possession and enjoyment of the property in suit; and that the defendant Ram Manohar had, in execution of his decree of the 6th July, 1877, which was against the defendant Sheo Narain Singh only, the other members of the family not being parties to it, caused to be attached and notified for sale the whole of the family property as the property of the defendant Sheo Narain Singh.

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The decree of the 6th July, 1877, had been obtained under these circumstances: On the 17th June, 1874, the defendant Sheo Narain Singh executed in favour of the defendant Ram Manohar an instrument called a "*zar-i-peshgi*" lease, by which he transferred to him the zamindari shares before-mentioned, in consideration of an old loan of Rs 49-15-0 and a fresh loan of Rs. 50. This instrument recited that the executant was "in possession of the shares and by payment of government revenue enjoying the income and profits thereof", and that the further advance to him of Rs. 50 was made "to meet his wants." It further recited that the executant had put the "lessee" into possession of the shares, and then proceeded as follows:—"I declare that the said lessee shall, until the payment of the principal mortgage-money, without being offered resistance by any person, remain in possession of the property leased, and plough, settle, collect, and cultivate the same, and enjoy the income of the shares in lieu of his *zar-i-peshgi*, and pay Rs. 4 to me the executant on account of the Government revenue every year: I the executant have no claim to the mesne profits nor has the mortgagee to the interest: that whenever at the close of the month of Jaith in any year, I the executant or my heirs pay the principal mortgage-money, Rs. 99-15-0, mentioned in the deed to the banker, then by taking back the instrument I shall enter upon possession of the property leased". The instrument concluded by stating that if the "mortgagee" was ejected "in any way without the payment of the mortgage-money, he should be at liberty to recover the mortgage-money, with interest at four rupees per cent. per mensem, from the zamindari shares in suit." On the 26th May, 1877, the defendant Ram Manohar instituted a suit against the defendant Sheo Narain Singh, in the Court of the Munsif of Balia, on this instrument, claiming to recover Rs. 239-9-0, prin-

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cipal and interest, by the sale of the zamindari shares, on the ground that on the 7th January, 1875, the defendant Sheo Narain Singh had resisted his making collections, and had made collections himself, whereby he, Ram Manohar, had been dispossessed. The Munsif gave Ram Manohar a decree for the amount claimed against Sheo Narain Singh "and the hypothecated property."

The defendant Ram Manohar set up the following defence to the present suit:—"That the plaintiff, notwithstanding his knowledge of the transaction, had kept quiet and admitted it; under these circumstances his claim is improper: that the justice of the defendant's claim is not denied and its nature is not open to any objection, therefore under Hindu law and precedents the defendant's debt is chargeable on the property advertised for sale as well as against the plaintiff and other sharers, and the property cannot be exempted: that the defendant Sheo Narain Singh, having borrowed the money secured by the bond for the maintenance and the benefit of the plaintiff and all other members of the family, had executed the document in question: that the defendant Sheo Narain Singh and all other members of the family benefited by the loan: that the defendant Sheo Narain Singh, having failed to fulfill the promise, the defendant obtained a decree; and that the defendant Sheo Narain Singh has caused his son to bring this suit, with a view to delay the recovery of the money due to this defendant."

The suit was not defended by the defendant Sheo Narain Singh. On the date fixed for the settlement of issues (11th December, 1878,) the plaintiff's vakil stated to the Munsif that he did not require to examine any witnesses. The defendant's vakil also stated on the same occasion that, if the plaintiff admitted that he had been living with his father, the defendant also did not require to examine any witnesses. The plaintiff's vakil then admitted "that the plaintiff lived as a member of a joint family in commensality, and that he derived benefit from the property in suit as one of the joint family." The second issue fixed by the Munsif was: "Whether the property in suit is actually owned and possessed by plaintiff or Sheo Narain Singh, defendant, and whether it is liable to be sold in satisfaction of the decree?"

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The Munsif decided this issue against the plaintiff and dismissed the suit, for the reasons which will appear from the following extract from his judgment :—" The Court has deliberately taken into consideration the precedents cited by the parties. The Privy Council ruling relied on and quoted by the plaintiff's pleader, *Deendyal Lall v. Jugdeep Narain Singh* (1), is inapplicable to the present suit for the following reasons :—(i) In that case the debt had been contracted by the father for his own personal use, and not to meet any legal necessity, such as maintenance of his family. Now the plaintiff in this case has not only failed to prove that the defendant No. 2 had borrowed the money for his personal use, and that he spent it for his own purposes (his wife and his sons, the plaintiff and others, not participating in the benefit), but it also appears, on the contrary, from the statement of his pleader recorded in the proceeding dated the 11th December, 1878, that the money secured by the bond was enjoyed by the plaintiff, his mother, and brothers, when they admittedly lived and messed together. Under these circumstances all the property pledged in the bond is liable for the debt and the plaintiff's share cannot be exempted. (ii) The precedent applies to the case of a transfer made by the ancestor of an ancestral joint property without the consent of his co-sharers who did not benefit by the transaction. In this case the defendant No. 2 borrowed money of a banker while living and messing jointly, and spent it for the benefit of his wife and sons, and when the banker demanded the money he caused this suit to be brought under colour of the Hindu law. It is impossible that the son should remain ignorant of the act of his father with whom he lived. The plaintiff ought to have brought a suit when the defendant No. 2 had acted beyond his power in borrowing the money for his own use on the security of the ancestral property. But at that time the plaintiff, his brothers, and the wife of the defendant No. 2 jointly appropriated the money quietly. A decree was eventually passed for that money and the property having been advertised for sale the present suit has been instituted. There can be no doubt that the suit has been brought in collusion with the defendant No. 2 for a dishonest purpose."

(1) I. L. R., 3 Calc., 198.

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On appeal by the plaintiff the Subordinate Judge affirmed the Munsif's decision and dismissed the appeal. The material portion of the Subordinate Judge's judgment was as follows :—"It appears from the proceeding dated the 11th December, 1878, referred to by the Munsif, that the plaintiff has admitted the fact of his living with his father. It is clear that the plaintiff and his father live together, and it is also clear that the plaintiff has been living in commensality with his father, who is the judgment-debtor, and that the debt was for the plaintiff's support and benefit. It is also clear that the property continued all along in possession of the plaintiff's father, the judgment-debtor, who hypothecated all that was in his possession. Under these circumstances no part of the property can be, in consideration of the plaintiff's right of inheritance, exempted from liability for the money lent for the use of the joint family by the defendant-respondent. As the judgment-debtor was in possession of the property which he had hypothecated in the bond, it was not necessary to implead the plaintiff. As the plaintiff was aware of the defendant-respondent's just demand, and of the decree, and the suit, and as he took no measures at that time for his protection from the demand which has not been paid off as yet, the claim of the plaintiff does not deserve any consideration. The precedents cited by the plaintiff cannot be applicable to a case in which a debt is contracted for the support and benefit of the children, and in which the father has possession of the whole property which he has pledged. The fact of the whole property being liable for the debt is apparent from the plaint, in which the plaintiff himself says that all the property has been hypothecated. In short, with reference to the facts of the case, the Munsif's decision deserves to be upheld. According to law, a son who wants the property of his father is bound to pay his father's debt. The debt was contracted for the support of the children including the plaintiff and it is a just debt. The debt being incurred in good faith for the support of the joint family, the liquidation thereof is incumbent on all persons. No plea against the validity of the debt is worthy of consideration. It being necessary for a son to pay his father's debt, and he having failed to do so, the property is in consequence advertised for sale by auction; the plaintiff's claim must be considered improper".

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The plaintiff appealed to the High Court, contending that his right, title, and interest in the family property could not be sold in the execution of a decree against his father, to which he was not a party ; and that the only question to be determined was whether the decree as made could be executed against him, and it was not proper to go behind the decree and inquire into the nature of the debt.

The Senior Government Pleader (*Lala Jitala Prasad*), for the appellant.

*Lala Lalta Prasad*, for the respondent.

The judgment of the High Court (SPANKIE, J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.—It appears that the defendant Ram Manohar obtained a decree against the defendant Sheo Narain Singh, the father of plaintiff, upon a bond executed by him, and sought to execute the decree against certain joint family property pledged in the bond, and the plaintiff has brought this suit to exempt his share in the joint family property from sale on the ground that the defendant Ram Manohar only obtained a decree against his father, and it is only his father's rights that can be taken in execution under such a decree. The decree was passed against the property pledged in the bond, and the finding of the lower appellate Court on the facts is that father and son lived together as members of an undivided Hindu family, the property being in the father's possession and management, and that the debt was incurred for the plaintiff's support and benefit, and the money was lent for the use of the joint family by the defendant Ram Manohar, and the plaintiff was aware of the transaction.

It is undoubted that the whole ancestral property is liable for a debt contracted by a father under such circumstances, and there is no weight to be attached in the present case to the contention that, the decree being against the father only, it is only his interest that can be sold, for we cannot but hold that the suit and decree in this case must be regarded as against the father as representing the joint family.

In a recent case before the Judicial Committee of the Privy Council, *Bissessur Lall Sahoo v. Luchmessur Singh* (1), decided

(1) L. R., 6 Ind. Ap., 233; 5 Calc. L. R. 477.



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15th July, 1879, where the question was whether certain family property could be held liable under decrees obtained against members of the joint family, their Lordships appear to consider that, where the family is joint, there may be a presumption that the party sued is sued as a representative of the family, and they held that, when the decrees are substantially decrees in respect of a joint family and against the representatives of the family, they may be properly executed against the joint family property. Such appears to be the case in the suit in which this appeal has been made. Much stress has been laid by the plaintiff-appellant's counsel on the case of *Deendyal Lall v. Jugdeep Narain Singh* (1). In that case it was held that the auction-purchaser, who was also the decree-holder, "could not acquire more than the right, title, and interest of the judgment-debtor; and if he had sought to go further, and to enforce his debt against the whole property, and the co-sharers who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it; by the proceedings which he took he could not get more than that was seized and sold in execution, viz., the right, title, and interest of the father."

But our view of the case before us, which proceeds on the representative character of the judgment-debtor as representing the family, cannot be said to be in conflict with the principle laid down in the above case.

We affirm the decree of the lower appellate Court and dismiss this appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

SHANKAR DIAL (DECREE-HOLDER) v. AMIR HAIDAR AND OTHERS (JUDGMENT-DEBTORS). \*

*Objection to attachment of attached property by judgment-debtor—Order against decree-holder—Decree-holder's remedy—Appeal—Suit to establish right—Act X of 1877 (Civil Procedure Code), ss. 278, 279, 280, 281, 282, 283.*

An objection was made to the attachment of certain property in the execution of a decree, by the judgment-debtor, on the ground that such property was

(1) I. L. L., 3 Calc., 198.

\* First Appeal, No. 145 of 1879, from an order of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 18th July, 1879.

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in his possession, not as his own property, but on account of an endowment. This objection was one of the nature to be dealt with under s. 278 and following sections of Act X of 1877. The Court executing the decree made an order against the decree-holder releasing the property from attachment. *Held* that such order was not appealable, the fact that the objection was made by the judgment-debtor notwithstanding, and the decree-holder's proper remedy was to institute a suit, under the provisions of s. 283 of Act X of 1877.

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The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Shah Asad Ali*, for the respondents.

The judgment of the High Court (PEARSON, J. and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The decree-holder, appellant before us, sought to attach certain property in execution of his decree, and the judgment-debtors objected that they held the property, not as their own property, but as superintendents of an endowment to which the property belonged, and they objected to the attachment. The Court of first instance released the property from attachment on the objections taken. The decree-holder appealed to the Judge, who dismissed the appeal on the ground that, with reference to the value of the subject-matter, it lay to the High Court. The decree-holder has now appealed to this Court. A preliminary objection appears to us to be valid, to the effect that there is no appeal, and that the decree-holder's proper remedy is by regular suit.

The objections taken to the attachment were of the nature of those to be dealt with under s. 278 and following sections, Civil Procedure Code, and the remedy for the party dissatisfied is under s. 283 by regular suit. The case is not altered by the circumstance that the objectors were the judgment-debtors. It has been held frequently that the provisions of s. 278 and following sections apply equally to the objections by parties to the suit as by strangers, when their objections are of the nature of those with which those sections deal.—*Haris Chandra Gupto v. Srimati Shashi Mala*

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*Gupti* (1) : In the matter of the petition of J. B. Rainey (2) : *Chunder Kant Surmah v. Bungshee Deh Surmah* (3). We dismiss the appeal with costs.

*Appeal dismissed.*

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February 21.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

BALDEO PRASAD AND ANOTHER (PLAINTIFFS) v. GRISH CHANDAR BHOSE  
(DEFENDANT) \*

*Suit on lost Cheque—Parties to Suit—Act X of 1877 (Civil Procedure Code), s. 61.*

The indorsees of a cheque sued the indorser, stating in their plaint that the cheque had been lost and that the defendant refused to give them a duplicate of it, and claiming a duplicate of it or the refund of the money they had paid the defendant on the cheque.

*Held* that the plaint disclosed a cause of action against the defendant. *Held* also that the plaint should be amended by joining the drawer of the cheque as a defendant in the suit.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi *Hanuman Prasad* and Lala *Lalta Prasad*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babus *Oprokash Chandar Mukarji* and *Baroda Prasad Ghose*, for the respondent.

The judgment of the High Court (PEARSON, J. and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The case of the plaintiffs is that a cheque No. 3821 of 18th October, 1877, drawn by Captain C. Ellis, Emigration Agent, on the Bank of Bengal, for Rs. 300, was endorsed over to their agent, Parsotam Das, by the defendant, for valuable consideration. Parsotam Das sent the cheque to the plaintiffs' firm at

(1) 6 B L R., 721 (3) 6 W. R., 61.  
(2) 6 B L R., 725..

\* First Appeal, No. 130 of 1879, from a decree of H. D. Willock, Esq, Judge of Azamgarh, dated the 4th April, 1879.

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Ghazipur, and they forwarded it by post to their firm at Arrah, but it was lost in transit. The defendant refused to give a duplicate of the cheque; and the plaintiffs now sue to compel him to give a duplicate or to refund the money, and to pay damages, Rs. 48, equivalent to interest on the amount of the bill lost by plaintiffs owing to defendant's refusal, and future interest from date of institution of the suit. The defendant replies that he did not indorse the cheque over to plaintiffs; that it was drawn payable to Babu Hari Mohan Banarji, who indorsed it. The Judge has rejected the plaint on the ground that it does not disclose a cause of action. This is, however, erroneous.

Under s. 61, Code of Civil Procedure, a suit may be maintained on a lost negotiable instrument, and, if it be proved that the instrument is lost, and if an indemnity be given by the plaintiff to the satisfaction of the Court against the claims of any other person upon such instrument, the Court may make such decree as it would have made if the plaintiff had produced the instrument in court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint; and in Byles on Bills of Exchange, 11th ed., chapter XXVIII, p. 378, we find that the relief administered by Courts of equity will be afforded, "not only on bills, but on notes; not only against the drawer, but against the indorser, or the acceptor; not only may a new bill be required, but payment; but the Court will not call on a party to renew or pay a lost bill without providing him with a satisfactory indemnity."

The defendant Babu Grish Chandar Bhose, assuming him to be the indorser of the cheque, cannot give the new cheque asked for without the co-operation of the alleged drawer, Captain Ellis; and the plaintiff should amend his plaint by joining Captain Ellis as a defendant in the suit, and praying that the relief sought may be given against both defendants.

The Judge will return the plaint to the plaintiff to be amended accordingly, and his order rejecting it is set aside, and the costs of this appeal will be costs in the cause.

*Order accordingly.*

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*Before Mr. Justice Pearson and Mr. Justice Straight.*

**THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) v. SHEO SINGH RAI AND ANOTHER (PLAINTIFFS).\***

*Contract—Bailment—Government Promissory Note—Contributory negligence—Master and servant*

The agent of the plaintiff delivered to the Treasury officer at Meerut nine Government Promissory notes, aggregating Rs. 48,000 in value, in order that such notes might be transmitted to the Public Debt office at Calcutta for cancellation and consolidation into a single note for Rs. 48,000, having previously indorsed the plaintiff's name on such notes at the request of a subordinate of the Treasury officer, and received a receipt for such notes under the hand of the Treasury officer. Owing partly to such indorsements and partly to the negligence of the Treasury officer such subordinate was enabled to misappropriate and negotiate two of such notes, aggregating Rs. 12,000 in value. The remaining seven of such notes were despatched to Calcutta, and a consolidated note for Rs. 31,200 was returned and delivered to the plaintiff, when the misappropriation of the two notes was discovered. The plaintiff sued Government claiming "that it might be directed to make restitution of the two notes or to deliver two other notes of equal value or their value in cash" with interest. On behalf of Government it was contended that it was not liable to the plaintiff's claim, inasmuch as the plaintiff, by his agent, had contributed to the loss of the two notes, and a master was not liable in damages for loss or injury sustained through the fraud or dishonesty of his servant without the scope of his employment. *Held* that, the two notes not having been delivered to the Treasury officer as a bailee but having been surrendered, the receipt given by that officer must be regarded as an undertaking on the part of Government to deliver a consolidated note for Rs. 48,000 in due course, and the plaintiff's suit was in reality one for damages on account of the refusal of Government to discharge its obligation, the measure of those damages being the amount by which the note for Rs. 31,200 fell short of Rs. 48,000 with interest, and such being the suit, the contention of Government was not any answer to it.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

The *Senior Government Pleader* (Lala Juala Prasad), for the appellants.

Mr. Conlan, for the respondents.

The following judgments were delivered by the Court :

STRAIGHT, J.—The plaintiffs in this suit claim from the Collector of Meerut, as representing the Secretary of State for India, restitu-

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\* First Appeal, No. 26 of 1879, from a decree of Babu Kashi Nath Biswas Subordinate Judge of Meerut, dated the 27th November, 1878.

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tion of two Government Promissory notes of the loan of 1854-55, made over to the Meerut Treasury on their behalf by their duly authorised agent on the 12th August, 1872. They further ask alternatively for other notes of equal value or for the equivalent cash with interest at four per cent. from date of last payment. The lower Court decreed the claim and the defendant now appeals.

The facts of the case, which are not disputed, appear to be as follows:—The plaintiffs are Commissariat agents carrying on business in the city of Delhi, under the style or firm of Sheo Singh Rai, Nihal Singh. On the 12th August, 1872, they sent by the hand of their gomashtha, Sumair Chand, nine Government Promissory notes of the value in all of Rs. 48,000 to the Meerut Treasury office, in order that they should be forwarded thence to Calcutta for cancellation and consolidation into one note. At that time the regular Treasury Officer, Mr. Billings, was absent on leave, and one Babu Kali Charan, Deputy Collector, was holding charge in his stead. Employed in the office in the capacity of chief clerk was a certain Muhammad Husain, and it was his special duty, when securities were left there for transmission to Calcutta, to see that they were carefully packed and despatched, as speedily as possible, and to prepare the necessary forwarding letter that had to accompany them. Muhammad Husain had been for many years in the Government service, and the most perfect confidence was reposed in him by his superior officers, and those who were acquainted with him or had to come in contact with him in business matters had entire faith in his integrity and honesty. It was to this man that Sumair Chand delivered the nine Promissory notes on the 12th August, 1872. The following is his account of what then occurred : “Muhammad Husain then made a mark on the notes and then I signed for Nihal Singh : Muhammad Husain himself wrote something, or he caused some other person to write something, on the notes, and then he had the interest paid to me : on the same day he again asked me to sign the notes at another place, which he said was required to get the notes consolidated: these too I signed for Nihal Singh : then he asked me to remain outside and that he would do all that was required : after some time I was called in and Muhammad Husain gave me a receipt in

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English." The receipt here referred to was for the nine Promissory notes, and bears the signature of "Kali Charan, Treasury Officer." In ordinary course it should take from ten to fifteen days to transmit the notes to the Public Debt Office at Calcutta for cancellation and to get back the consolidated note. Subsequent to the 12th August, 1872, Sumair Chand called on two or three occasions at the Meerut Treasury to know whether his note had arrived, but on each occasion his inquiries were answered by Muhammad Husain to the effect that it had not been received from Calcutta. Somewhere about the beginning of March, 1873, Muhammad Husain absconded, and on the 31st of that month a consolidated note, which had been received from Calcutta, for Rs. 31,200, was handed to the plaintiffs, but as it should have been Rs. 48,000, as shown by the receipt of the 12th August, 1872, suspicion was necessarily at once awakened and inquiry was instituted, with the following result. Two of the nine notes made over by Sumair Chand to Muhammad Husain, numbered 017849 for Rs. 12,000, and 020102 for Rs. 5,000, had never been forwarded to Calcutta at all, but had been misappropriated by him, he taking advantage of the blank indorsement of the name of Nihal Singh by Sumair Chand to make the latter one payable to himself, by writing above that signature the words "Sold to Muhammad Husain": while, on the other, under a pretended authority from Nihal Singh, he put "Pay to the Agra Bank or order." On the note for Rs. 12,000 the Bank made Muhammad Husain an advance in August, 1872, of Rs. 8,000, and on that of Rs. 5,000 in December of Rs. 2,300, retaining them as security. With regard to the remaining seven Promissory notes, they remained in the Treasury at Meerut until the 19th February, 1873, upon which day they were sent to Calcutta for cancelment and consolidation, accompanied by a forwarding letter signed by Mr. Billings, who had returned from leave and resumed charge. At that time Muhammad Husain had made the necessary formal indorsement on these seven notes, above the name of Nihal Singh, which amounted to an acknowledgment on the part of that person, that he had "received a new note in exchange." When the misappropriation of these two notes was discovered, they were, as has already been stated, in the hands of the Agra Bank; and this fact coming to the

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knowledge of Mr. Billings, he, in his capacity of a Magistrate of the first class, issued a most illegal and improper search-warrant, upon the strength of which the Bank premises were entered, and the two notes were carried away by force to the Treasury for restoration to the plaintiffs. The natural consequence of this most unwarrantable proceeding was, that the authorities of the Bank instituted a suit against Mr. Billings for restitution of the two notes and damages for their illegal seizure, and in the course of the litigation, the Secretary of State for India, and the present plaintiffs, were brought upon the record as defendants. Ultimately this Court, upon appeal by the Bank, on the 29th May, 1876, reversed the decision of the Subordinate Judge dismissing the claim of the Bank, and passed a decree in its favour, the result of which was that the two notes were restored. These two notes are the subject of the present suit, and it may be remarked that, since their return to the Bank, they have been negotiated away, and are now in the hands of third parties, whose names do not appear.

The plaintiffs came into Court with their present claim on the 17th August, 1878, and the relief asked in the plaint is that "the Government may be directed to make restitution of the two notes, or to deliver other notes of equal value or their value in cash, amounting to Rs. 17,000, with interest at four per cent. from date of last payment, viz., the 1st July, 1872, to date of suit, amounting in all to Rs. 21,165". This the Subordinate Judge has decreed, and the defendant now appeals against that decision on two grounds, (i) That the plaintiffs, in the person of their agent, were guilty of contributory negligence, (ii) That a master is not liable in damages for loss or injury sustained through the fraudulent or dishonest act of his servant without the scope of his employment.

Both these points were urged at great length on the hearing of this appeal by the Senior Government Pleader, and many English and American authorities were cited, under both heads of argument. But upon a close and careful consideration of all the facts in the case, it appears to me that the contention for the appellant proceeded on a complete misconception of the real nature of the suit, for which I may add the Subordinate Judge is primarily responsible. In my judgment he was in error in dealing with the



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question between the parties as governed by the law relating to bailments. The nine Promissory notes were not made over to the Meerut Treasury for any temporary purpose, upon the accomplishment of which they were to be returned or otherwise disposed of according to the directions of the bailor. On the contrary, they were unconditionally surrendered, when they were handed over by Sumair Chand for cancelment, and the effect of their delivery to the Treasury at Meerut is the same as if they had been taken by the plaintiffs to the Public Debt Office at Calcutta and handed over there. In those individual notes, as individual notes, they retained no interest. Properly the plaintiffs might for their own protection have refused to give them up except upon receipt of the consolidated note, and I think they would have been justified in doing so ; but the Government has, for its own convenience and security, established a rule that persons wishing to have old securities cancelled and consolidated are required, not only to deliver up their old securities, but to give a receipt in advance for the new one, their only document of title being the written acknowledgment of the Treasury Officer, that their securities have been received. As a matter of fact they have no option, and in order to obtain what they want, they must perforce conform to the requisitions. In my opinion the receipt given in the present case by Babu Kali Charan, the acting Treasury Officer, must be regarded as an undertaking on the part of the authorities to deliver one consolidated note for Rs. 48,000 in due course. Consequently, I do not think that there was any bailment of the two notes in the defendant for the plaintiffs, but that there was a contract entered into, the effect of which was that the plaintiffs were entitled to demand, and the defendant was bound to give, a consolidated note of the value of Rs. 48,000. The present suit is, therefore, in reality one for damages on account of the defendant's refusal to discharge his obligation, and the measure of those damages must be the amount by which the note for Rs. 31,200 falls short of Rs. 48,000, with interest. Regarding the case in this light, it is difficult to see in what way the two pleas in appeal are in any way an answer to the plaintiffs' claim. The authority of Babu Kali Charan to bind the Government is unquestioned, and if he chose to contract

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it into a responsibility without proper care and caution, that is a matter which in no way affects the position of the plaintiffs. It is perfectly obvious, that Kali Charan was guilty of the greatest negligence in not verifying the nine notes, and seeing they were properly indorsed before he gave his receipt. Moreover, he was grossly careless, both in failing to lock them up in the safe, of which he had the key, and in forgetting their receipt, and in not requiring Muhammad Husain to prepare the forwarding letter for his signature, and to pack them for transmission thither. The evidence of Mr. Billings seems to me to establish the negligence of the Treasury in the most conclusive way, and had a bailment been established, or were this rightly an action of tort for the loss of the two notes, I think an overwhelming case would have been made out against the defendant. I am well aware that heads of departments and offices in a superior position in the public service are, from pressure of business, necessarily compelled to rely largely on the good faith and honesty of their subordinates, and I should never be disposed to draw the line too tightly in forming an opinion as to what, under this or that state of circumstances, they ought or ought not to have done. But reasonable and intelligent confidence is one thing, blind and careless trust is another; and while the one may fairly be accepted in explanation or excuse, the other should never be allowed in extenuation or relief from responsibility. The clerk in a bank handles unlimited sovereigns and bank notes during the hours of business, but no employer exercising the most ordinary precaution or prudence would fail to have his cash and securities locked up at the close of each day and so kept until banking hours recommenced. To do otherwise would afford unreasonable temptations, of which were the clerk to take advantage, the employer should not have the benefit to escape from the liability to third parties for any loss or damage they might thereby sustain.

In the present case the Government had the misfortune to be badly served. It had, as its representative in authority, a person who was negligent and slipshod in the discharge of his duties of control and supervision over a subordinate, who took advantage of these deficiencies to perpetrate a series of misappropriations and forgeries. Upon all the facts the inference is irresistible, that, but

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for this laxity of administration in the Meerut Treasury on the part of Babu Kali Charan, the two notes could never have been stolen, nor the forgeries committed in respect of them, and such being the case it is impossible to avoid remarking, that it is matter for regret the plaintiffs' claim should ever have been contested, much less that a countercharge of contributory negligence should have been made against them. Were it necessary to dispose of this allegation, I should have unhesitatingly come to the conclusion, that no sufficient case to establish it had been made out. A person like Sumair Chand going into a Government office can hardly be expected to anticipate that he will be made the victim of fraud and misrepresentation by the officials employed there. On many previous occasions Sumair Chand had drawn interest on Promissory notes for his masters at the Meerut Treasury through Muhammad Husain, and had also made over notes to him for consolidation and always without misadventure. It is not by what we know now, but from the state of things that existed at the time of the delivery of the notes, that the conduct of Sumair Chand must be judged, and looking at it from this point of view, I do not find any such evidence of co-operative negligence as would disentitle the plaintiffs, either as bailors or parties damnified, from recovering damages.

But, as I have in an earlier part of this judgment pointed out, this suit is properly one for breach of contract, by reason of the failure of the defendant to discharge his obligation to give a consolidation note to the extent of Rs. 48,000, and, in my judgment, the pleas in appeal to this Court, and in answer to the plaintiffs' claim in the Court below, are irrelevant and afford no answer to the case set up. The property of the plaintiffs in the nine notes was determined, when they were handed over and the receipt was given, and thereupon an implied undertaking on the part of the defendant to deliver an equivalent security after the lapse of a reasonable interval of time was to be assumed. It is clear that, to all intents and purposes, the notes had been reduced into the possession of Government, and that all right to or control over them had been parted with by the plaintiffs. Whether they were properly taken care of or not was indifferent to them, for, at any time on the presenta-

tion of their official receipt, they were entitled to demand a consolidation note for Rs. 48,000. Such being the view I entertain of the case, I am of opinion that this appeal should be dismissed with costs. But the decree must be amended from the shape in which the relief has been given by the lower Court, so as to declare the plaintiffs entitled to damages, such damages to be the amount of the two promissory notes for Rs. 12,000 and Rs. 5,000, with interest from 1st July, 1872, to date of payment.

PEARSON, J.—I concur generally and substantially in the view taken of the case by my honorable and learned colleague, and in dismissing the appeal with costs, and in amending the decree of the lower Court in the manner proposed by him.

*Appeal dismissed.*

*Before Mr. Justice Oldfield and Mr. Justice Straight.*

NARSINGH DAS (DECREE-HOLDER) v. NARAIN DAS (JUDGMENT-DEBTOR).\*

*Execution of decree—Limitation—Act XV of 1877 (Limitation Act), sch. ii, arts. 177, 179 (2), 180.*

*Held* that the words "appeal" and "Appellate Court" in art 179 (2), sch. ii. of Act XV of 1877, include an appeal to Her Majesty in Council.

*Held*, therefore, where an appeal had been preferred to Her Majesty in Council from a decree of the High Court dated the 18th August, 1871, and the High Court's decree was affirmed by an order of Her Majesty in Council dated the 12th August, 1876, and an application for execution of the High Court's decree was made on the 15th July, 1879, that, under art 179 (2), sch. ii. of Act XV of 1877, the limitation of such application must be computed from the date of the order of Her Majesty in Council.

THE decree of which execution was sought in this case was one made by the High Court on the 18th August, 1871, on appeal from a decree of the District Judge of Benares. On the 28th January, 1874, the decree-holder applied for the execution of the High Court's decree. On the 12th August, 1876, an appeal having been preferred from the decree to Her Majesty in Council, the High Court's decree was affirmed. On the 15th July, 1879, the decree-holder made the present application for execution of the High Court's decree. The District Judge of Benares held that

First Appeal, No. 154 of 1879, from an order of G. E. Knox, Esq., Judge of Benares, dated the 15th October, 1879.

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this application was barred by limitation, inasmuch as between the 28th January, 1874, and the 15th July, 1879, the decree-holder had taken no action in the matter of the execution of the decree. In so holding the Judge disallowed the decree-holder's contention that the period of limitation should be computed from the date of the order of Her Majesty in Council, such order being the order of an "Appellate Court" within the meaning of No. 179, proviso 2, sch. ii. of Act XV of 1877. The Judge observed with reference to this contention as follows:—"No. 179 is only for those cases for which No. 180 does not provide, while No. 180 is clearly intended for all orders of Her Majesty in Council. I cannot hold that Her Majesty in Council was ever intended as an Appellate Court in No. 179."

The decree-holder appealed to the High Court, again contending that limitation should be computed from the date of the order of Her Majesty in Council.

The *Senior Government Pleader* (Lala Juala Prasad) and Pandit Ajudhia Nath, for the appellant.

Mr. Conlan and Pandit Bishambhar Nath, for the respondent.

The following judgments were delivered by the Court :

OLDFIELD, J.—I hold that the decree which is now being executed is the decree of the High Court, and the law of limitation which will govern the case is art. 179 (2), Act XV of 1879, —“(Where there has been an appeal), the date of the final decree or order of the Appellate Court.” In the case before us there was an appeal to Her Majesty in Council who affirmed the decree of this Court, the date of the order on that appeal being 12th August, 1876, and the present application is within time from that date.

I see no reason to doubt that the words “appeal” and “Appellate Court” in art 179 (2) are intended to include appeals to Her Majesty in Council, since we find that these appeals are made the subject of legislation in the Act, which in art. 177 provides the limitation for the admission of such appeals, and in art. 180 provides the limitation for enforcing orders of Her Majesty in Council made in course of such appeals. Were it otherwise and were appeals referred to in art 179 (2) restricted to appeals preferred to the

Appellate Courts in India, a party who had appealed to Her Majesty in Council from a decree of a Court in India would be in a worse position, in respect of the limitation for the execution of his decree, than a party who had appealed to an Appellate Court in India.

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I would decree the appeal with costs and set aside the order of the Judge and remand the case for disposal on the merits.

STRAIGHT, J.—I am of opinion that the decree which is now proposed to be executed is the decree of the High Court of the 18th August, 1871, and that the law of limitation which must govern the matter is contained in art. 179, Act XV of 1877, paragraph 2, column 3. In the present case there was an appeal to Her Majesty in Council and the decree of this Court was ultimately affirmed by order of the 12th August, 1876. During the pendency of that appeal, time did not run and the period of limitation only began on the passing of the final order. The present application by the decree-holder, appellant before us, was made on the 15th July, 1879, and is therefore within time. I see no reason to doubt that the words "appeal" and "Appellate Court" are now intended to include appeals to Her Majesty in Council, for we find those appeals made the subject of legislation in Act XV, which by art. 177 provides a period of limitation within which they may be admitted. Moreover, art. 180 establishes a limitation for enforcing orders of Her Majesty in Council, a provision, the presence of which may be accounted for by certain observations contained in the judgment of the Privy Council in the case of *Kristo Kinker Ghose Roy v. Burroda Kant Singh Roy* (1), quoted by Mr. Conlan in arguing this matter before us for the respondent. The question that arose there related to Act XIV of 1859 and neither in that Statute nor in Act IX of 1871 were there analogous articles to art. 177 or to the last sentence of art. 180. So far as that decision is concerned, it does not appear to me to be otherwise in any way relevant to the present case.

I agree that the appeal should be decreed with costs, and that the Judge should dispose of the application of the decree-holder on its merits.

*Cause remanded.*

(1) 17 W. R., at p. 297.

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## CRIMINAL JURISDICTION.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

EMPRESS OF INDIA v. O'BRIEN.

*Culpable homicide not amounting to murder—Voluntarily causing hurt—Causing death by negligence—Act XLV of 1860 (Penal Code), ss. 304, 304A, 322, 325—Spleen disease.*

*B* voluntarily caused hurt to *N*, who was suffering from spleen disease, knowing himself to be likely to cause grievous hurt, but without the intention of causing death, or causing such bodily injury as was likely to cause death, or the knowledge that he was likely by his act to cause death, and caused grievous hurt to *N*, from which *N* died. *Held* that *B* ought not to be convicted under s 304A of the Indian Penal Code of causing death by negligence, but under s 325 of that Code of voluntarily causing grievous hurt.

THIS was a case called for by the High Court under s. 294 of Act X of 1872. The facts of the case are sufficiently stated in the order of the High Court.

STUART, C. J.—The circumstance that the accused, O'Brien, was at the time of the offence of which he was convicted under the influence of drink cannot in the least degree mitigate his guilt. The facts material to the case appear to be these:—On the evening of the 2nd September, 1879, the accused O'Brien and a companion named Sharling were dining at the house of a friend in Agra within the Rajputana State Railway lines, and about mid-night they sallied forth walking towards the Fort. O'Brien perceived a ghari which they wished to hire, but the driver, a man named Wazir, a witness in the case, refused to give it unless the fare was prepaid. O'Brien and Sharling then walked on to a place where an ekka was standing, and presuming that it belonged to a man who was sleeping on a charpoy close by roused him and told him to let them have the ekka. This man was Nathu the deceased. Nathu explained that the ekka did not belong to him and remarked at the same time that he was ill. Here-upon O'Brien got irritated and committed the assault on the person of Nathu which caused his death. He pulled the charpoy about, causing the deceased to fall out of it, kicked him, and struck him on the side or on the ribs with a stick, and of the injuries the deceased thus received he died very soon after. The Civil Surgeon in his post

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mortem examination states that the deceased's spleen had been ruptured in four places in its outer surface, one of which ruptures was very deep, extending to the inner surface of that organ. It would thus appear that the assault by the accused on Nathu was of a very serious nature, rendering a fatal result inevitable. The Magistrate committed O'Brien under ss. 323 and 325 of the Indian Penal Code, but the Judge amended the charge by substituting s. 304A, Indian Penal Code, for ss. 323 and 325. The case was clearly not one of culpable homicide, and s. 304A provides that "whoever causes the death of any person by doing any rash or negligent act, not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both," and a plausible argument might be maintained to show that the assault by O'Brien on the deceased was within the meaning of that section. But I think it safer to convict O'Brien under s. 325, because I consider that s. 304A has in view utter indifference as to the possibly or probably fatal consequences of his act, on the part of an offender under it, and s. 325 in my opinion more fairly and accurately satisfies the requirements of the evidence. I would, therefore, set aside the conviction under s. 304A and convict O'Brien under s. 325 of the Indian Penal Code. As to the sentence, I consider that passed by the Judge inappropriate and inadequate, and such sentence I would therefore set aside, and in lieu thereof I would sentence the accused G. W. O'Brien to one year's rigorous imprisonment and to pay a fine of Rs. 100, or in default of payment of such fine to suffer a further period of three months rigorous imprisonment. Of course so much of the fine of Rs. 300 awarded by the Judge as has been paid and exceeds the fine now imposed will be returned to the accused.

SPANKIE, J.—The facts found are not disputed. We had issued notice to the accused to show cause why his sentence should not be revised but he has not appeared. He has been convicted of having assaulted without any provocation an old man sleeping outside his house, and having beaten him with a stick on the sides. The blow ruptured the man's spleen and caused his almost immediate death. The Magistrate who conducted the preliminary inquiry committed the accused under ss. 323 and 325 of the Indian Penal



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Code. But the Sessions Judge altered the charge into one of s. 304A of the Code and sentenced the accused to pay a fine of Rs. 300, or in default to suffer rigorous imprisonment for six months. The attention of the Court was drawn to the case, and the record was sent for.

S. 304A appears to be wholly inapplicable to the facts as found by the Sessions Judge. The circumstance that the medical evidence established death by rupture of the spleen did not reduce the accused's act to one of culpable rashness or culpable negligence. It has been laid down that "culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection" (1).

There is no reason to doubt that the act was not done with the intention of causing death, or of causing such bodily injury as the accused knew was likely to cause the death of the old man, nor was the act done with the intention of causing bodily injury to the man, nor was the bodily injury intended to be inflicted sufficient in the ordinary course of nature to cause death, nor did the accused, when striking the man, know that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. The offence, therefore, of culpable homicide was not committed. But I think that there can be no doubt that the accused committed the offence of voluntarily causing grievous hurt. He struck deceased on the ribs with a stick and inflicted a hurt which not only endangered his life but actually caused his death, and which he must have known was likely to break a rib if it did no worse injury. The fact that he was intoxicated at the time cannot alter the nature of the act

(1) *Nidumarti Nagabhushanam*, 7 Mad. H. C. R., 119.

committed by the accused. S. 86 of the Penal Code applies strictly to this case.

I would set aside the conviction under s. 304A and convict accused under s. 325 of the Penal Code. Considering the unprovoked character of the attack and the circumstances attending it, it appears to me one which is not sufficiently punished by a fine. I would sentence the accused G. W. O'Brien to one year's rigorous imprisonment, and to a fine of Rs. 100, or a further period of three months rigorous imprisonment. So much of the fine, if paid, that exceeds the fine proposed, should be returned to the accused.

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## APPELLATE CIVIL.

1880  
March 8.

*Before Mr. Justice Pearson and Mr. Justice Spinkie.*

MAZHAR ALI KHAN AND ANOTHER (DEFENDANTS) v. SARDAR MAL  
(PLAINTIFF) \*

*Bond—Interest—Penalty.*

The defendants on the 8th May, 1869, gave the plaintiff a bond for the payment of Rs. 2,000 on the 16th February, 1870. This amount consisted of two items, viz., Rs. 1,650, principal, and Rs. 350, interest in advance at the rate of two per cent. per mensem for the period between the date of the bond and its due date. The bond provided that, in default of payment on the due date, interest on the whole amount of Rs. 2,000 should be paid at the rate of two per cent. per mensem from the date of the bond. *Held*, in a suit on the bond in which interest was claimed at the rate of two per cent. per mensem from the date of the bond, that this provision was penal, and the penalty ought not to be enforced.

THIS was a suit on a bond executed by the defendants in favour of the plaintiff on the 8th May, 1869. The material portion of this bond was as follows:—"We Mazhar Ali and Fazal Ali do declare that we have borrowed Rs. 1,650 from Sardar Mal: adding Rs. 350 to this sum on account of future interest, we admit that Rs. 2,000 is payable by us to the lender: we promise to pay that amount without interest at the close of the month of Magh, Sambat 1926 (16th February, 1870): should we fail to pay the amount of principal and interest entered in the bond at the time

\* First Appeal, No. 6 of 1880, from a decree of C. W. Moore, Esq., Judge of Aligarh, dated the 23rd September, 1879.

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fixed, then we will pay interest on that amount, *viz.*, Rs. 2,000, at two rupees per cent. per mensem from the date of the bond, in addition to the interest stipulated to be paid as above." The defendants having failed to pay the amount of the bond on the due date, the plaintiff claimed interest on the principal amount sued for at the rate of two rupees per cent. per mensem calculated from the date of the bond to the date of the institution of the suit, *viz.*, the 23rd June, 1879. The defendants contended that the stipulation to pay interest from the date of the bond at two rupees per cent. per mensem, in case of default, was penal and should not be enforced. The Court of first instance disallowed this contention, observing as follows :—" The Court finds that the condition as to paying interest at twenty-four per cent. (per annum) in the event of default, from the date of the execution of the bond, whether penal or not, is not unreasonable : the rate is by no means uncommon, and though no doubt the terms of the bond, in the event of default as regards the period between execution and the first date fixed for payment, may now seem hard to the defendant debtors, yet they agreed to those terms with their eyes open : nor were they obliged by circumstances to take the loan : the bond shows that they took the money with a view to speculating in indigo, and no doubt they looked for a profit which would much more than cover the rate of interest fixed in the bond : the Court sees no reason why, because or when the defendant debtors failed in their speculation, they should be allowed to evade their agreement willingly made."

The defendants appealed to the High Court.

Pandit *Ajudhia Nath*, for the appellants.

Munshi *Kashi Prasad* and Lala *Hur Kishan Das*, for the respondent.

The judgment of the High Court (PEARSON, J. and SPANKIE, J.) was delivered by

PEARSON, J.—The amount of the bond consisted of two items, *viz.*, Rs. 1,650, principal, and Rs. 350, interest in advance at the rate of two per cent. per mensem for the period between the date of the bond and the 16th February, 1870, the date on which it was

stipulated that the whole amount of Rs. 2,000 should be paid. The provision that, in default of payment on the date stipulated, interest on the whole amount of Rs. 2,000 should be paid at the rate of two per cent per mensem from the date of the execution of the bond was so far penal that in effect it more than doubled the rate of interest for the period above-mentioned. That penalty ought not, in our opinion, to be enforced. The rate of two per cent. per mensem is not so unusual as to be unreasonable. (The judgment then proceeded to determine what sum was due to the plaintiff).

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SARDA R MAL*Decree modified.*


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## CRIMINAL JURISDICTION.

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1880  
March 11.*Before Mr. Justice Straight.*

EMPRESS OF INDIA v. BHUP SINGH.

*Reference to High Court under s. 296 of Act X of 1872 (Criminal Procedure Code)  
by Court of Session.*

A Court of Session, after it had asked the assessors their opinion in a case which was being tried by it, suspended the trial of the case and made a reference to the High Court under s. 296 of Act X of 1872, on a question of jurisdiction which had arisen in the trial of the case. *Held* that it was not intended that that section should be so used, and the Court of Session must dispose of such question itself.

THIS was a case referred to the High Court by Mr. W. C. Turner, Sessions Judge of Agra, under s. 296 of Act X of 1872. The Judge in referring the case observed as follows:—"The assessors unanimously found the accused Bhup Singh guilty of the offence specified in s. 363 of the Penal Code. S 9 of Act XI of 1872, which was in force at the time the offence was committed (committed to Sessions on the 30th September, 1879), provides that no charge as to any offence shall be inquired into in British India, unless the Political Agent, if there be such, for the territory in which the offence is said to have been committed, certifies that, in his opinion, the charge is one which ought to be inquired into in British India. The committing Magistrate appears to have overlooked the section quoted above, and I would therefore submit the case for orders to the Hon'ble Court as to whether the Political Agent

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should be called on, first, to certify that the charge is one which should be inquired into in British India, and, if his reply be in the affirmative, that a new trial be had, or if, as the accused has not apparently been prejudiced in his defence, and the Political Agent now certifies, as above, judgment can be given on the evidence recorded."

STRAIGHT, J.—It appears to me that the Judge has adopted an unusual and very inconvenient course, in suspending the conclusion of the trial of Bhup Singh for the purpose of making a reference to the Court on a question of law that has arisen in the course of it. I do not think it ever was intended that s. 296 should be so used. The Sessions Judge has the whole case fully before him, and is in possession of all the materials necessary for him to give his judgment. If he decides wrongly, there is ample power in the Local Government on the one hand, or the accused on the other, to appeal to this Court and have the matter set right, and I certainly do not think that, at this stage, I am called upon to advise the Sessions Judge as to the view he should take. Upon his own responsibility and in the exercise of his discretion he must dispose of the case, and, if he feels there is substantial force in the point that has arisen in reference to the charge under s. 363, Penal Code, he must not hesitate to acquit. I would point out to him that as yet he has passed no decision upon the charge under s. 420, Penal Code, though he took the opinions of the assessors upon it. Probably in respect of this he will find that no difficulty of jurisdiction arises. The record will be returned and he will dispose of the case.

## APPELLATE CIVIL.

1880  
March 15.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spinkie.*

MOTI BIBI (DEFENDANT) v. BIKANU (PLAINTIFF)\*

*Appeal—Limitation.*

*B* sued *M* and *T* for money due on a bond, and on the 27th April, 1877, obtained a decree against *T*; the suit against *M* being dismissed. *T* applied for a

\* Second Appeal, No. 719 of 1879, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 12th February, 1879, modifying a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 29th June, 1878.

review of judgment, and *B* also made a similar application. On the 25th May, 1877, *T*'s application was granted, and on the 16th July, 1877, *B*'s was rejected. On the 29th June, 1878, the Court re-heard the suit against *T*, and dismissed it. *B* appealed, making *T* and *M* respondents, and impugning in his memorandum of appeal the decree of the 27th April, 1877, as well as that of the 29th June, 1878. The appellate Court, assuming that the appeal was one from the decree of the 27th April, 1877, preferred beyond time, admitted it after time, and after hearing the case on its merits gave a decree against *M*, and dismissed the suit as regards *T*. *Held* that the appellate Court erred in assuming that the appeal was from the decree of the 27th April, 1877, and that it was at liberty to admit it beyond time, the appeal being from the decree of the 29th June, 1878, that decree being the one which had brought *B* before that Court as an appellant, and that the appellate Court was not competent on an appeal from the decree of the 29th June, 1878, to reconsider the merits of the case against *M*, the appeal from the decree of the 27th April, 1877, being barred by limitation, and that decree and the decree of the 29th June, 1878, being separate and distinct, and not appealable in one memorandum of appeal from the latter decree.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi *Hanuman Prasad* and *Lala Ram Prasad*, for the appellant.

Pandit *Ajudhia Nath* and *Babu Sital Prasad Chatterji*, for the respondent.

The High Court (STUART, C. J., and SPANKIE, J.,) delivered the following

JUDGMENT.—The plaintiff-respondent sued *Tara Kishore* and *Moti Bibi* for Rs. 800, under a bond dated 19th March, 1874, executed in favour of *Tara Kishore*, the plaintiff being the real creditor. Appellant *Moti Bibi*, defendant, denied that she had borrowed money from plaintiff under any agreement whatever, and also any execution of a bond in his favour: for a particular purpose she had borrowed money from defendant *Tara Kishore*, executing a bond in his favour, and preserving her property from sale: afterwards arrangements for the sale of the property which had been entered into, previous to the execution of the bond, with *Tara Kishore* fell through, and a sale was effected with one *Ghazi*, plaintiff's brother, but as a portion of the consideration was not paid a quarrel ensued which has led to the institution of the present suit by plaintiff upon the bond of the 19th March, 1874. The Sub-

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ordinate Judge on the 27th April, 1877, decreed in favour of plaintiff for the amount claimed, but dismissed the claim as against Moti Bibi, defendant. Tara Kishore, defendant, who had not appeared in the suit, applied for a review of judgment, and plaintiff also applied for the same as against Moti Bibi, defendant. The Subordinate Judge on the 16th July, 1877, refused the plaintiff's application for review as against Moti Bibi previously exonerated. But on the 25th May he had already accepted the application of Tara Kishore for review. On the 29th June, 1878, the Subordinate Judge reconsidered the case. He refers to his original judgment, observing that, as there had been no proof of contract between the plaintiff and Moti Bibi, he had dismissed the claim as against her: but on the evidence of Badal and Kali, agents of Tara Kishore, that they had borrowed money from plaintiff on behalf of the said Tara Kishore, he decreed the claim against that defendant: but Tara Kishore now urged that the plaintiff had not claimed the money from him, but from Moti Bibi, and that Badal and Kali were no agents of his, and had not acted upon his authority. The Subordinate Judge held that there was no proof that Badal and Kali were the agents of Tara Kishore or that he had authorised them to borrow the money or had promised to repay it: Tara Kishore had denied all knowledge of Moti Bibi, and plaintiff admitted that he was not personally acquainted with Tara Kishore. The lower appellate Court, therefore, dismissed the claim as against Tara Kishore.

The plaintiff then appealed to the Judge, making both defendants respondents, and, referring to the previous decision of the 27th April, 1877, it appeared that he was appealing from that decision as well as from that of the 29th June, 1878. The Judge admits that, so far as the decision of the 27th April, 1877, is concerned, the appeal is barred, but he nevertheless admitted it, as the proceedings of the Subordinate Judge, in granting one application for review and rejecting the other, were of a curious nature. It was, he considered, a case in which the parties might be misled as to the particular date on which the period allowed for appeal would begin to run against them: the appeal of plaintiff was, in his opinion, made *bonâ fide*: the plaintiff had all along proceeded

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against Moti Bibi as the obligor, having made Tara Kishore defendant *pro forma*: he was merely the nominal obligee, plaintiff being the real creditor: Moti Bibi did not deny that she had received the money on the execution of the bond, pleading, according to the Judge, that Tara Kishore, and not plaintiff, was the party to sue her. The lower appellate Court finds that the money was borrowed for Moti Bibi's use at the instigation of Tara Kishore, and also for his benefit, and he (the Judge) was not satisfied that Tara Kishore had not made himself liable for the money. But he decreed the claim on appeal against Moti Bibi and dismissed it as against Tara Kishore, who, however, would pay his own costs.

It is contended by Moti Bibi that the decision of the 27th April, 1877, not having been appealed within the period prescribed by law, had become final; that the application of plaintiff-respondent for review as against appellant had been rejected, and the order passed upon it was final; and that, as no sufficient reasons for the admission of the appeal after time had been assigned by respondent, the Judge had acted erroneously in admitting the appeal: moreover, the suit had been separated against each defendant and on different dates: there could not be a single appeal against the two decrees; and appellant further contends that there was no contract between herself and plaintiff, nor had she executed the deed of the 19th March, 1874.

There can be no doubt that, if the appeal heard by the Judge is one from the decision of the Subordinate Judge dated 27th April, 1877, it is after time, and that the proper course for respondent, after that decision had been delivered and a decree had passed against him, was to have appealed the decree. The memorandum of appeal presented to the Judge refers to the decision of the 27th April, 1877, and to the intermediate miscellaneous proceedings with reference to the application of Tara Kishore for review, and that of the plaintiff for the same purpose as against Moti Bibi. But there can be no doubt that it was the decree passed by the Subordinate Judge on the 29th June, 1878, that had brought plaintiff before the Judge as an appellant. The appeal from that



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decree was admittedly within time. The question arises whether the Judge was at liberty in this appeal to reconsider the merits of the case as against Moti Bibi. It is true that she appeared as respondent and defended the appeal. But in doing so she only acted in obedience to the notice of the Court served upon her; and because she did so we do not think that it can be successfully contended that she should not be allowed to plead now that appeal as against her was barred by lapse of time. The decree of the 29th June, 1878, was not passed against her, but as against Tara Kishore; she was not a party to the review. If the plaintiff was desirous of appealing as against her from the decree of the 27th April, 1877, he might have done so within the time allowed by law, or if under any misapprehension he had allowed that period to run by, he should have presented his memorandum of appeal and assigned reasons for not presenting his appeal within such period. The Court, had he done so, might then, under s. 5 of Act XV of 1877, have admitted the appeal after time, if satisfied that the appellant had sufficient cause for not making his application within time. This course the plaintiff did not adopt, but waited until the decree of the 29th June, 1878, after the admission of Tara Kishore's application for review, had been made, dismissing the suit as against the said Tara Kishore. It seems to us that the appeal before the Judge was an appeal against the decree of the 29th June, 1878, under cover of which the plaintiff desired to re-open the claim as against Moti Bibi, which had been dismissed on the 27th April, 1877. We do not think that this course was legal, and we hold that the Judge has acted erroneously in assuming that the appeal was one against the decree of the 29th April, 1877, and that he was at liberty to admit it under s. 5 of the Limitation Act. It seems clear to us that the decrees of the 27th April, 1877, and of the 29th June, 1878, are separate and distinct, and that they could not be appealed in one memorandum of appeal from the decree of the 29th June, 1878. We, therefore, decree the appeal and reverse the judgment of the lower appellate Court with costs.

*Appeal allowed.*

*Before Mr. Justice Oldfield and Mr. Justice Straight.*

1880  
March 15.

**JHUNNA (PLAINTIFF) v. RAMSARUP AND OTHERS (DEFENDANTS).\***

*Hindu Law—Widow—Maintenance.*

In a case where a Hindu widow is entitled to maintenance, it is better to award a fixed annual sum and not a share of the income of the estate.

THE plaintiff in this suit was the widow of one Zalim Singh, deceased, who was a member of a joint Hindu family consisting of six brothers. She sued her deceased husband's brothers claiming to be paid an annual allowance, by way of maintenance, of Rs. 48, at the rate of Rs. 4 per mensem, out of his one-sixth share in the family estate, which was in the possession of the defendants. This estate consisted of zamindari shares, gardens, and certain land in a mauza called Rijlaman. The Court of first instance gave her a decree directing that the defendants, and their representatives and assigns, should pay her annually Rs. 48 out of the income of her husband's one-sixth share of the family estate. On appeal by the defendants the lower appellate Court modified this decree, directing that the plaintiff should receive as an allowance one-sixth of the income of the family estate,

The plaintiff appealed to the High Court, contending that her allowance should be fixed.

*Babu Baroda Prasad Ghose*, for the appellant.

*Mr. Chatterji* and *Babu Ratan Chand*, for the respondents.

The Court (OLDFIELD, J. and STRAIGHT, J.) remanded the case to the lower appellate Court, the order of remand being as follows :

STRAIGHT, J.—The plaintiff-appellant is the widow of one Zalim Singh a brother of the defendants. This suit was brought to have the sum of Rs. 48 fixed as the amount of yearly maintenance the plaintiff was entitled to receive from her husband's family. The first Court passed a decree in her favour for the sum prayed. The lower appellate Court has modified the Munsif's order, allotting the maintenance at one-sixth of the hereditary

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\* Second Appeal, No. 742 of 1879, from a decree of R. F. Saunders, Esq., Judge of Farnkhabad, dated the 4th April, 1879, modifying a decree of Maulvi Wajid Ali, Munsif of Kaluganji, dated the 18th February, 1879.

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property in suit, that fraction representing the share to which Zaliin would have been entitled had he been alive. The right of the plaintiff to maintenance is clear; indeed, that is positively found by both the lower Courts. We do not, however, agree with the observations of the Judge, that "the income being variable according to the seasons, it is better not to affix a given sum for maintenance, but to let that be determined as the occasion may arise." For reasons of convenience and in order to prevent the recurrence of litigation between the parties, we think it far better that a reasonable fixed sum, having regard to all the circumstances of the case, should be ascertained and decreed to the plaintiff. (The Court then proceeded to make an order remanding for trial the issue whether Rs. 48 was a reasonable amount of yearly maintenance to be allowed to the plaintiff, and if not, what fixed sum would be)

*Appeal allowed.*

1880  
March 29.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

GOBIND SINGH (DEFENDANT) v. KALLU AND OTHERS (PLAINTIFFS).\*

*Suit for redemption of Usufructuary Mortgage—Valuation of suit—Jurisdiction—  
Act VI of 1871 (Bengal Civil Courts Act), s. 22.*

The plaintiffs sued for the possession of certain immoveable property, alleging that they had mortgaged such property to the defendants, and that the mortgage debt had been satisfied out of the profits of the property. The defendants set up a defence to the suit which raised the question of the proprietary right of the plaintiffs to the property. The value of the mortgagees' interests in the property was below Rs. 5,000; the value of the mortgaged property exceeded that amount. On appeal to the High Court from the original decree of the Subordinate Judge in the suit it was contended that the appeal from that decree lay to the District Court and not to the High Court. *Held* that the "subject-matter in dispute," within the meaning of s. 22 of Act VI of 1871, was the mortgage and the mortgagees' rights under it, and that, the value of this being only Rs. 2,000, the appeal should have been preferred to the District Court. Second Appeal No. 1039 of 1877 (1) dissented from.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

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First Appeal, No. 93 of 1879, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 30th June, 1879.

(1) Unreported, decided the 18th January, 1878.

*Munshi Hanuman Prasad* and *Babu Oprokash Chāndar Mukerjee*, for the appellant.

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*Pandit Ajudhhia Nath* and *Lala Harkishen Das*, for the respondents.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.,) was delivered by

STRAIGHT, J.—This is a first appeal from a decision of the Subordinate Judge of Aligarh of the 30th June, 1879. The plaintiffs-respondents sued for possession of mauza Chiti, pargana Chandos, by redemption of a mortgage for Rs. 2,000 executed, as far back as 1835, by Jai Kishan and others, of whom they are the representatives, to Hardeo Singh, whose rights have come to the defendants by purchase. The plaintiffs alleged that the principal sum and interest secured by the instrument had been discharged out of the profits, and they prayed that the property might be restored to them. The Subordinate Judge dismissed the claim of all the plaintiffs, with the exception of three, Kallu, Gobardhan, and Parsa, in whose favour he gave a decree in part. Gobind Singh alone of all the defendants now appeals to this Court.

Upon the case being called on for hearing before us, it was urged as a preliminary objection by Pandit Ajudhia Nath on behalf of the respondents, that the appeal had been wrongly preferred to the High Court, as the subject-matter in dispute being the mortgage, and the value of the mortgagee's rights under it, which were below Rs. 5,000, it properly lay to the District Judge. The following decisions of this Court were referred to in support of this contention,—Second Appeal No. 521 of 1869; Second Appeal No. 511 of 1878; and Second Appeal from order No. 51 of 1879 (1).

On the other side the appellant urged that, as by the statement of defence filed, a question of proprietary title to property of the value of Rs. 15,000 was raised, the appeal was cognizable by this Court. In support of this view our attention was called to a decision of Turner, J. and Spankie, J. in Second Appeal No. 1039 of 1877 (2), which, if accurate, is undoubtedly applicable to the present case.

(1) Unreported. (2) Unreported, decided the 18th January, 1878.

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The question thus raised is one of some importance, and, having regard to the precedents already enumerated, we thought it right to take time to consider judgment. The point turns upon the construction of the words "subject-matter in dispute" of s. 22, Act VI of 1871.

In the present case the plaintiffs' suit was essentially one for redemption of mortgage, the court-fee payable on which would have to be calculated according to the "principal money expressed to be secured by the instrument of mortgage,"—Art. ix, s. 7 of Court Fees' Act. It is true that the defendants by their pleas opened up a wider field for inquiry, involving the consideration of their proprietary title to the property. But we do not think that the character or nature of the subject-matter of the plaintiffs' claim was thereby altered; it continues in its original shape so far as he is concerned, nor is the complexion of it entirely changed because the defendants put forward certain grounds of defence which, if well-founded, must defeat his right to redeem. We therefore think that the subject-matter in dispute was the mortgage and the mortgagee's right under it, and that, the value of this being only Rs. 2,000, the appeal should have been preferred to the Judge. We regret that the decision should be directly at variance with the judgment of Turner and Spankie, JJ., already mentioned, but the point appears to us so clear, that we feel constrained to differ from the view enunciated by those two learned Judges.

The memorandum of appeal will be returned to the appellant for presentation in the proper Court and the appellant will pay the respondents' costs in this Court.

*Order accordingly.*

1880.  
March 23.

*Before Mr. Justice Oldfield and Mr. Justice Straight.*

HIRA LAL (DEFENDANT) v. KARIM-UN-NISA (PLAINTIFF)\*.

*Sale in execution of decree—Sale set aside—Suit by auction-purchaser to recover purchase-money—Act VIII of 1859 (Civil Procedure Code), ss. 256, 257, 258—Act X of 1877 (Civil Procedure Code) ss. 312, 315—Warranty—Caveat emptor.*

Certain immoveable property was attached and proclaimed for sale in the execution of a decree on the application of the decree-holder, H, as the property

\* Second Appeal, No. 883 of 1879, from a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 26th May, 1879, affirming a decree of Mir Auwar Husain, Munsif of Moradabad, dated the 26th November, 1873.

of his judgment-debtor. *W* objected to the attachment and sale of such property on the ground that it did not belong to the judgment-debtor, but was endowed property. His objections were disallowed, and the property was put up for sale on the 20th July, 1875, under the provisions of Act VIII of 1859, and was purchased by *K. W* subsequently sued *K* to establish his claim to the property and to have the sale set aside, and on the 18th August, 1876, obtained a decree setting it aside. Thereupon *K* sued *H* to recover the purchase-money, alleging a failure of consideration. *Held* that, the sale not having been set aside in favour of the judgment-debtor on the ground of want of jurisdiction or other illegality or irregularity affecting the sale, but having been set aside in favour of a third party who had established his title to the property, and there being no question of fraud or misrepresentation on the part of the decree-holder, the suit was not maintainable. *Rajib Lochan v. Bimalamoni Dasi* (1) and *Sowdamini Chowdhraïn v. Krishna Kishor Poddar* (2) followed. *Makunli Lal v. Kaunsila* (3). *Neelkunth Sahas v. Azmun Matho* (4), and *Doolhin Hur Nath Koonweres v. Baijoo Oojha* (5) distinguished.

*Held* also that the auction-purchaser could not have applied under s. 315 of Act X of 1877 for the return of the purchase-money, as the provisions of that section could not have retrospective effect, and would not apply to a sale which had taken place before that Act came into operation. *In the matter of the petition of Malu* (6) dissented from.

*Per STRAIGHT, J.*—That, had the provisions of that section been applicable, instead of instituting a suit, the auction-purchaser should have applied for the return of her purchase-money in the execution of the decree.

The facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

*Lala Latta Prasad* and *Lala Harkishen Das*, for the appellant.

*Munshi Hanuman Prasad* and *Mir Zuhur Husain*, for the respondent.

The following judgments were delivered by the Court :

*OLDFIELD, J.*—*Hira Lal*, defendant, the appellant before us, caused five bighas, fifteen biswas of land to be attached in execution of his decree against *Khadim Husain* and *Isri Husain*, as property belonging to the judgment-debtors. One *Wilayat Husain* objected to the attachment and sale on the ground that the property did not belong to the judgment-debtors, but was endowed property; his objections were disallowed, and the property was sold by auction,

(1) 2 B. L. R., A. C., 83; 10 W. R. 365.

(2) 4 B. L. R., F. B., 11; 12 W. R., F. B. 8.

(3) I. L. R., 1 All., 563.

(4) H. C. R., N.-W. P., 1871, p. 67.

(5) H. C. R., N.-W. P., 1867, p. 50.

(6) I. L. R., 2 All., 299.

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and purchased by the plaintiff for Rs. 505 on the 20th July, 1875, and the money paid over to the defendant, and the sale was confirmed on the 11th September, 1875. Wilayat Husain, however, brought a suit to set aside the sale, on the ground that the judgment-debtors had no right and title in the property, which was an endowment, and he obtained a decree on the 18th August, 1876, and the sale was set aside. The plaintiff has now brought this suit to recover from the decree-holder the purchase-money with interest, and the Courts below have decreed the purchase-money with interest at six per cent. It is contended in second appeal that no suit will lie for refund of purchase-money, that plaintiff's proper remedy was to proceed in the execution department under the provisions of s. 315, Act X of 1877, and that interest should not be allowed.

In my opinion, the first plea is valid. The sale took place under the provisions of Act VIII of 1859, and, although s. 258 directs that, whenever a sale of immoveable property is set aside, the purchaser shall be entitled to receive back his purchase-money, this provision applies only to cases in which the sale has been set aside for irregularities or the like under ss. 257 and 258 of the Act, and not when a third party succeeds in establishing his title to the property. This view of the law has been held in a course of decisions of the Calcutta Court—*Rajib Lochun v. Bima'amoni Dasi* (1) and *Sowdamini Chowdhraïn v. Krishna Kishor Poddar* (2), and I am not aware of any by this Court opposed to it. The case of *Makundi Lal v. Kaunsila* (3) proceeded on the ground that the decree-holder had fraudulently executed a decree against a person not bound by the decree, and had caused the sale of his property, and is not in point, nor are the two cases referred to by the Munsif. In *Neelkunth Sahee v. Asmun Matho* (4) there was no power to bring the judgment-debtor's property to sale under the decree; and in *Doolhin Hur Nath Koonweree v. Baijoo Oojha* (5) the decree-holder had caused property to be sold which through belonging to the judgment-debtor was not saleable in execution of a decree.

(1) 2 B. L. R., A. C., 83; 10 W. B. 365.

(2) 4 B. L. R., F. B., 11; 12 W. R., F. B. 8.

(3) I. L. R., 1 All., 568.

(4) H. C. R., N.-W. P., 1871, p. 67.

(5) H.C.B., N.-W. P., 1867, p. 50.

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The terms of s. 315, Act X of 1877, are different to those of s. 258, and by s. 315, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money from any person to whom the purchase-money has been paid. But it is unnecessary to determine whether plaintiff could succeed under this section, as its provisions cannot have retrospective effect, and will not apply to a sale which has taken place before the Act came into operation; and I am unable to take the view on this point of the learned Judges who decided the case of *Mulo*, petitioner, decided the 7th May, 1879 (1), which was brought to our notice at the hearing.

The liability of a decree-holder must be decided according to the conditions of the sale in force when he caused the property to be sold, and any warranty of title in the judgment-debtor is not ordinarily given by the judgment-creditor in judicial sales held under the Civil Procedure Code; nor can it be held that the decree-holder undertook to warrant the title of the judgment-debtor in the property sold in the case before us. The rule of law in respect of sales in execution of decrees has been declared by the Privy Council in *Dorab Ali v. Abdul Aziz* (2). Their Lordships observe: "Now it is of course perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-debtor;" and again: "The Sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in exercise of his jurisdiction, although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment debtor".

The sale in the case before us not having been set aside in favour of the judgment-debtor on the ground of want of juris-

(1) I. L. R., 2 All., 299.

(2) I. L. R., 3 Calc., 806; L. R., 5 Ind. Ap., 116.



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diction or other illegality or irregularity affecting the sale, and there being no question of fraud or misrepresentation on the part of the decree-holder, I am of opinion that the plaintiff cannot succeed in this suit, and it should be dismissed, and the appeal decreed, with all costs, and the decrees of the lower Courts reversed.

STRAIGHT, J.—I am of the same opinion as my honourable colleague. It does not appear to me that the provisions of s. 315 of Act X of 1877 are applicable to a sale which took place in July, 1875, and the relief now afforded to auction-purchasers is not open to the plaintiff. Were there not a Full Bench decision of the Calcutta Court in *Sowdamini Chowdhraïn v. Krishna Kishor Poddar* (1) as to the construction to be placed upon s. 258 of Act VIII of 1859, I should have had no difficulty in holding that the setting aside of sale contemplated therein is governed by ss. 256 and 257, which gave the Court summary powers to set aside sales on the ground of material irregularity in "publishing or conducting them." In the present case no allegation of that kind is made, but the plaintiff bases her claim to a refund of the purchase-money paid by her, because the consideration for that payment has totally failed. It is not alleged that any fraud or misrepresentation was used at the time of the auction-sale, which took place through the Court, and it is clear that no warranty of title or guarantee of undisturbed possession can be implied to a purchaser.

The following rule of law laid down by Lord St. Leonards in *Vendors and Purchasers*, 14th edition, p. 1, is relevant:—"If at the time of the contract the vendor himself was not aware of any defect in the estate, it seems that the purchaser must take the estate with all its faults and cannot claim any compensation for them." And in the same work the following passage occurs:—"If the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity (2)." In the present case, so far from there being any evidence of *mala fides* on the part of the judgment-creditor, the sale did not take place until Wilayat Husain's objections had been

(1) 4 B. L. R., F. B., 11; 12 W. R., F. B., 8.

(2) at p. 549.

heard and disposed of. There was, therefore, the strongest reason for his believing that the judgment-debtor had a saleable right, title, and interest in the property brought to sale.

Had the provisions of s. 315, Act X of 1877, been applicable, I think that the objection taken in the first ground of appeal by the appellant would have been fatal to the plaintiff's claim, and that, instead of instituting a regular suit, the proper course for an auction purchaser to pursue under circumstances such as those which have arisen in the present case is to apply under s. 312 in the execution department. This appeal must, therefore, be decreed with costs.

*Appeal allowed.*

## CIVIL JURISDICTION.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

DURGA PRASAD (DECREE-HOLDER) v. RAM CHARAN AND ANOTHER (JUDGMENT-DEBTORS).\*

*Appeal from Order setting aside sale of immoveable property in the execution of Decree—Act X of 1877 (Civil Procedure Code), ss. 312, 533 (m)—Act XII of 1879, ss. 90 (16), 102—Act I of 1868 (General Clauses Act), s. 6.*

On the 25th June, 1879, a Subordinate Judge made an order setting aside the sale of immoveable property in the execution of a decree, from which an appeal was preferred, under Act X of 1877, to the District Court on the 25th July, 1879, before Act XII of 1879 came into force. *Held* that, as the appeal would not have lain at all, had Act XII of 1879 been in force on the date of its institution, s. 102 of that Act did not apply, but as the appeal lay to the District Court under the law in force on that date, it was competent to dispose of it under the provisions of s. 6 of Act I of 1868.

Appeal from order No. 138 of 1879 (1) and Revision Case No. 38B. of 1879 (1) observed on.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. The petitioner was a decree-holder, in the execution of whose decree certain immoveable property belonging to his judgment-debtors had been sold. On the application of the judgment-debtors the sale was set aside by the Subordinate Judge of Farukhabad, the Court executing the decree, by an order bearing date the 25th June,

\* Application under 622 of Act X of 1877 connected with First Appeal, No. 10 of 1880, from an order of R. F. Saunders, Esq., Judge of Farukhabad, dated the 6th December, 1879.

(1) Unreported, decided the 11th February, 1880.

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1879. On the 25th July, 1879, or before Act XII of 1879 came into operation, the decree-holder preferred an appeal to the District Judge from the Subordinate Judge's order. On the 6th December, 1879, Act XII of 1879 having in the meantime come into force, the District Judge held, with reference to ss. 91 and 102 of that Act, that the appeal ought to be heard and determined by the High Court, and returned the memorandum of appeal to be presented to the High Court.

The decree-holder accordingly presented the memorandum of appeal to the High Court, and the High Court admitted the appeal. Subsequently, however, the decree-holder applied to the High Court, under s. 622 of Act X of 1877, for the revision of the District Judge's order on the ground that the appeal, having been preferred to that officer before Act XII of 1879 came into force, was cognisable by him.

Pandits *Bishambhar Nath* and *Nand Lal*, for the petitioner.

Babu *Oprokash Chandar Mukarji* and Munshi *Kashi Prasad*, for the opposite parties.

The High Court (PEARSON, J., and STRAIGHT, J.,) delivered the following

JUDGMENT.—The Subordinate Judge's order dated the 25th June, 1879, was appealable to the Judge under s. 588 (m), Act X of 1877, and was made the subject of an appeal to him on the 25th July, 1879, before Act XII of 1879 was passed. An order setting aside a sale under the second clause of s. 312, Act X of 1877, is not appealable under s. 588, Act X of 1877, as amended by s. 90 (16), Act XII of 1879. This being so, s. 102 of the latter Act, which provides for the disposal of "every appeal now pending which would have lain if the Act had been in force on the date of its institution," does not apply in this case, for the appeal would not have lain at all, had Act XII of 1879 been in force on the date of its institution; but, as the appeal lay to the Judge under the law in force on that date, he was competent and bound to dispose of it under the provisions of s. 6, Act I of 1868, which declare that the repeal of any Act shall not affect any proceeding commenced before the repealing Act shall have come into operation.

As the Judge failed to exercise a jurisdiction vested in him by law in the matter of the appeal, we set aside the order and direct the memorandum of appeal to be transmitted to him for disposal on the merits according to law.

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In the course of considering this matter we have had occasion to examine two decisions, passed by us on the 11th of February last, in Appeal from Order No. 138 of 1879 (1) and Revision Case No. 38B of 1879 (1).

We think it right to take this opportunity to say, as regards the first of these, that it was determined under an erroneous conception of s. 102 of Act XII of 1879. It was incorrect to say, that that section was "inapplicable" to that appeal. The order thereby appealed was one "*confirming a sale*," and it was appealable both under s. 588 of Act X of 1877 and the amendment of that section contained in Act XII of 1879. Moreover, that appeal was pending, when the last-mentioned Act came into force, and should, therefore, have been heard and determined as provided by the amendment to s. 589, namely, by this Court. Accordingly our order sending it back to the Judge for disposal was incorrect.

In Revision Case No. 38B. we were in error in using the expression "had the provisions of Act XII of 1879 been applicable, the appeal from the Munsif's order *setting aside the sale* would lie, not to the Judge but the High Court"; for s. 588, as amended, enacts, by omission, that appeals from orders setting aside sales can no longer be had. We have thought it right to correct this inaccuracy of expression, though our order in the case was perfectly regular.

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## APPELLATE CIVIL.

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*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

GANPATJI AND ANOTHER (PLAINTIFFS) v. SAADAT ALI AND OTHERS  
(DEFENDANTS).\*

*Mortgage—Sale in execution of decree—Vendor and Purchaser.*

The proprietors of a taluka and mahál called B, assessed with revenue at Rs. 6,800-4 7, to which certain lands which had been gained by alluvion apper-

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(1) Unreported, decided the 11th February, 1880.

\* First Appeal, No 50 of 1879, from a decree of Maulvi Mahmud Bakhsh, Additional Subordinate Judge of Ghazipur, dated the 28th February, 1879.

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tained, which lands had been formed into a separate mahál and assessed with revenue at Rs. 88, mortgaged it in these terms: "We agree mutually to mortgage the said taluka B, and accordingly after mortgaging and hypothecating the whole of the manzas original and appended, yielding a *jama* of Rs. 6,800-4-7, along with all original and appended rights, water and forest produce, high and low lands, cultivated and uncultivated lands, &c, &c., and all and every portion of our proprietary, possessory, and demandable rights, without excepting any right or interest obtained or obtainable, &c." Subsequently, the mahál taluka B, "together with original and attached mahál and all the zamindari rights appertaining thereto" was sold in the execution of a decree enforcing the mortgage. The auction-purchaser subsequently contracted to sell the "entire taluka B, *jama* Rs. 6,800-4-7" but afterwards refused to perform the contract and was sued for its specific performance. The plaint in this suit stated that the subject-matter of the contract was the "entire taluka B, *jama* Rs. 6,800-4-7," and the decree which the purchasers obtained for the specific performance of the contract referred to its subject-matter in similar terms.

*Held*, in a suit by the purchasers for the possession of the alluvial mahál, that the terms of the mortgage were sufficiently comprehensive to include that mahál, and it was not intended by the entry of the *jama* of mahál B, exclusive of the *jama* of the alluvial mahál, to exclude the latter from the mortgage, the entry of the *jama* being merely descriptive. Also that the alluvial mahál passed to the auction-purchaser at the auction-sale, under the words "attached mahál." Also that the sale to the plaintiffs passed the alluvial mahál, the words "the entire taluka B" being sufficient to include it, the entry of the *jama* of mahál B in the sale-contract, plaint, and decree being merely descriptive.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Messrs. Conlan and Colvin, the Senior Government Pleader (Lala Juala Prasad), and Munshis Hanuman Prasad and Sukh Ram, for the appellants.

Pandit Ajudhia Nath, Lala Lalta Prasad, and Munshi Kashi Prasad, for the respondents.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.—The case of the plaintiffs is that taluka Birpur with all the villages appertaining to it and all existent and contingent rights connected with it had been hypothecated to Nawab Jafar Ali Mirza, for money lent to Husaini Khanam and Bakya Bibi the proprietors, and the Nawab instituted a suit and obtained a decree against them, and in execution caused the taluka with

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all rights and interests to be sold, and himself purchased it on 20th November, 1872. After the purchase, the auction-purchaser agreed to sell the property to Jiwan Lal now represented by Ganpatji, who admitted the plaintiff Hari Das to an interest in the transfer, and after a suit instituted against the auction-purchaser they obtained a decree compelling the auction-purchaser to execute a sale-deed in their favour in accordance with the agreement. The plaintiffs have been obstructed by the heir of the judgment-debtors, the former owners of taluka Birpur, and by lessees put in by him, in obtaining possession of some alluvial land comprising 110 bighas, 12 biswas, 13 dhurs, which accreted to some of the villages comprising the taluka in 1860 and 1861, and was formed into a mahál and assessed with a revenue of Rs. 88 in 1863 and settled with the proprietors of taluka Birpur, and which the plaintiffs allege was sold at the auction-sale on 20th November, 1872, and passed by that sale to their vendor and to which they are in consequence entitled.

The defendants, one of whom is the heir of the former owners of the taluka, and the other two are lessees on his part, aver that this alluvial land was not hypothecated to Nawab Jafar Ali Mirza, nor included in the property sold at auction; that the property hypothecated and sold was the original mahál of taluka Birpur, excluding this land which was formed into a separate mahál recorded under the name of *Gang-barár*; and they further aver that the plaintiffs' vendor, the auction-purchaser, never considered himself the purchaser of this land nor agreed to sell this land, and it was improperly included in the sale-deed which the plaintiffs obtained by a decree of Court; and they further plead that the suit is not maintainable with reference to s. 241, Act XIX of 1873, and is barred by limitation.

The Subordinate Judge rightly held that there was no bar to the institution of this suit on the ground taken; and he proceeded to find that the land in dispute was not included in the hypothecation made by the owners of Birpur to plaintiffs' vendor, nor in the auction-sale, nor in the subsequent contract of sale by the plaintiffs' vendor to plaintiffs; and he bases this finding mainly on the following grounds: That the alluvial land formed a separate mahál

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bearing a separate number in the *tauzi* from that of Birpur, with separate revenue assessed, *viz.*, Rs. 6,800-4-7 on mahál Birpur, and Rs. 88 on mahál *Gang-barúr*, and had no connection with taluka Birpur; that all that was entered in the mortgage-deed as subject of mortgage was taluka Birpur proper, assessed with revenue of Rs. 6,800, and that the sale notification and application for sale made no separate reference to this mahál, and that it was not expressly included in the plaint (dated 19th March, 1874,) in the suit instituted by plaintiffs against the auction-purchaser, nor in the decree of 21st July, 1874, nor in the sale-contract by plaintiffs' vendor; and the Subordinate Judge argues that, being a separate mahál and not expressly included in the above documents, it cannot be held to have formed part of the property mortgaged and sold.

We are unable to take the same view as the Subordinate Judge. Taluka Birpur is shown to comprise a number of villages forming a mahál, and in 1860 the land in dispute was thrown up and accreted in front of five of these villages, Birpur, Barmara, Ami, Soharpur, and Narainpur, and in 1863 it was formed into a mahál and assessed with the proprietors of the taluka Birpur, and entered as "*Arazt gang-barúr*, mauzas Birpur, Barmara, Ami, Soharpur, and Narainpur appertaining to taluka Birpur." Thus, although formed into a separate mahál for fiscal purposes, the land would appear to have been attached to the mauzas to which it was an accretion, and at all events it is clear the new mahál after its formation appertained to taluka Birpur. The Subordinate Judge is therefore wrong in considering it had no connection with the taluka; on the contrary it appertained to it as a dependent mahál. By the terms of the mortgage-deed the owners of the taluka "agree mutually to mortgage the said taluka Birpur, and accordingly after mortgaging and hypothecating the whole of the mauzas original and appended, yielding a *jama* of Rs. 6,800-4-7, along with all original and appended rights, water and forest produce, high and low lands, cultivated and uncultivated land, inhabited, waste, and saline tracts, stone and wooden presses, *kacha* and *pucca* wells, reservoirs, and tanks, small tanks, and ponds, sir, *baghs*, scattered trees, trees bearing fruits and barren trees,

*chauni* houses and dwelling-houses, &c., and all and every portion of our proprietary, possessory, and demandable rights without excepting any right or interest obtained or obtainable.

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Now it seems to us, considering the fact that the alluvial mahál appertained to the taluka, that the above terms are comprehensive enough to include it in the property mortgaged; and if the sum entered as the *jama* was that of the taluka exclusive of the *jama* of the alluvial mahál, there was no intention by that entry to exclude the latter from the mortgage, the entry of the *jama* being merely descriptive. But the material point is not what was mortgaged but what was sold at auction. Unfortunately no sale-certificate is forthcoming, and it is alleged, and not disputed, that although the sale was confirmed no sale-certificate was obtained by the 'auction-purchaser, probably owing to the dispute between him and the plaintiffs. But we have in evidence the application for sale and the sale-notification, and in the former the decree-holder applies for the sale of "mahál taluka Birpur, together with original and attached mahál and all zamindari rights belonging thereto," and the sale-notification directs the sale of the "mahál Birpur, together with original and attached mahál and all the zamindari rights appertaining thereto." The attached mahál alluded to can be no other than this alluvial land, and we are at a loss to understand the Subordinate Judge's remark that the sale-notification and application for sale made no separate reference to this mahál.

We can come to no other conclusion than that this alluvial tract, formed into a separate mahál, remained attached to the taluka, and was included in the property sold at auction.

Nor do we agree with the Subordinate Judge that it was excluded from the sale to the plaintiffs, the enforcement of which they obtained under a decree of Court. The Subordinate Judge rests his finding on this point on the fact which he asserts that this land was not included in the sale-contract to plaintiffs, nor in their plaint in their suit to enforce that contract, nor in the decree which they obtained. But the whole force of the Subordinate Judge's opinion rests on an argument formed upon the amount of the *jama* which is entered in those documents as the *jama* of taluka



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Birpur, and which is said not to include the *jama* of the alluvial mahál. But the entry of *jama* is merely descriptive, while the essential part of the document is the entry in respect of the subject of sale, and this is the "entire taluka Birpur," a term sufficiently comprehensive to include the alluvial mahál appertaining to the taluka, and we may observe that the draft sale-deed, dated 21st January, 1874, expressly includes alluvial lands, and what is more to the purpose the sale-deed executed by order of the Court which gave the plaintiffs their decree expressly includes the disputed lands as conveyed to them by the auction-purchaser.

We reverse the decree of the lower Court and decree the claim with all costs.

*Appeal allowed.*

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March 9.

## PRIVY COUNCIL.

HIRA LAL (DECREE-HOLDER) v. BADRI DAS AND OTHERS  
(JUDGMENT-DEBTORS).

[On appeal from the High Court of Judicature at Allahabad,  
North-Western Provinces.]

*Limitation—Proceeding to enforce decree—Act XIV of 1869, s. 20.*

It was the object of the Legislature in Act XIV of 1869, s. 14, with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, *bonâ fide* and with due diligence, before a Judge whom he has supposed to have had jurisdiction, but who yet may not have had it. The same principle prevails in the construction of s. 20, with regard to executions. *Held*, accordingly, that a proceeding, taken *bonâ fide* and with due diligence, before a Judge whom the judgment creditor believed, *bonâ fide*, though erroneously, to have jurisdiction,—in this case the Judge himself, also, having believed that he had jurisdiction, and having acted accordingly,—was a proceeding to enforce the decree within the meaning of s. 20.

APPEAL from a judgment of the High Court of the North-Western Provinces (25th May, 1877,) affirming a judgment of the Judge of Agra (31st May, 1876,) allowing the objection of the respondents to the execution in 1874 of a decree obtained in 1867.

In 1867 the decree of which execution was refused in the Indian Courts was obtained by the appellant and one Makhan

*Present :—*SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH,  
and SIR R. P. COLLIER.

Lal, since deceased, for Rs. 11,566. A certificate for execution was issued on the 23rd March, 1868, by the Judge of that Court who in December, 1868, (nothing having been realized under it,) ordered that the execution be made over to the Subordinate Judge. The latter in December, 1868, ordered issue of attachment; and, on this proving fruitless, the execution-case, on the 3rd April, 1869, was struck off the file by the Subordinate Judge. The proceedings taken from time to time by the decree-holders in the Court of the Subordinate Judge to enforce the decree after that date until the re-institution of the proceedings in execution of the decree in the Court of the Judge of Agra, by petition of the 9th April, 1874, are stated in their Lordships' judgment.

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Mr. *L. Graham* appeared for the appellant.

The respondents did not appear.

Mr. *Graham* referred to the following cases, contending that the proceedings taken by the decree-holders had been sufficient within the meaning of s. 20 of Act XIV of 1859, to prevent the operation of that section, to bar execution.—*D. A. Dalvi v. Lakshuman Hari Pátíl* (1) : *Dheeraj Mahtab Chund v. Bulram Singh* (2) : *Ram Sahai Singh v. Degan Singh* (3) : *Roy Dhunpat Singh Roy v. Mudhomotae Dabia* (4) : *Benoderam Sen v. Brojendro Naran Roy* (5).

Their Lordships' judgment was delivered by

SIR BARNES PEACOCK.—The question in this case is whether the judgment-creditors, who on the 14th of January, 1867, obtained in the Court of the Judge at Agra a decree against the respondents, were on the 9th of April, 1874, barred by limitation from executing it. It appears that on the 3rd of December, 1868, the Judge sent the decree to the Subordinate Judge of the district to be executed by him, and that on the 3rd of April, 1869, the Subordinate Judge struck the execution-case off the file. On 9th of April, 1874, the case was re-instituted in the Court of the Judge by the petition which has given rise to the question now to be determined.

(1) 4 Bom. H. C. Rep. A. C. J., 86.

(4) 11 B. L. R., P. C. 23.

(2) 13 Moo. Ind. App. 479.

(5) 13 B. L. R., P. C., 169.

(3) 6 W. R. Misc., 98.

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Between the 3rd April, 1869, when the Subordinate Judge struck the case off his file, and the 9th April, 1874, proceedings were from time to time taken by the decree-holders in the Court of the Subordinate Judge to enforce the decree, but the question is whether those proceedings were sufficient to prevent the operation of the Limitation Act XIV of 1859, s. 20.

It appears that on the 18th February, 1870, an application was made by the decree-holders to the Subordinate Judge to set off a debt of Rs. 1,300, which they owed to a debtor to the respondents, against so much of the amount due to them under the decree, and the Subordinate Judge made an order that the application should be granted, that the decree-holders should file a receipt for Rs. 1,300, and that the case should be struck off the pending file. On the 18th February, 1870, therefore, the Subordinate Judge made an order by which a portion of the debt, to the extent of Rs. 1,300, was satisfied. Subsequently on the 8th of January, 1872, an application was made to the Subordinate Judge to send a certificate of the decree to the Political Agency at Indore in order that the decree might be executed there, whereupon he made an order that the Judge should be requested to send the record of the execution of decree; but inasmuch as an interval of more than one year had elapsed since the last order it was necessary, under s. 216 of Act VIII of 1859, to serve the judgment-debtors with a notice, in order that they might, if they could, show cause why the decree should not be executed against them. Accordingly a notice was sent to them in a registered cover by post, they living out of the jurisdiction of the Court, but it was returned, as the judgment-debtors were not found. That was on the 2nd April, 1872. The Subordinate Judge held that that was not a sufficient service upon the defendants, and ordered the case to be struck off the file of pending cases. On the 3rd May, 1872, he made an order: "That a notice be sent to the judgment-debtors by post in registered cover, fixing the 18th day of May as the date for showing cause, and that the case be brought forward on the said date." On the 30th May, 1872, the nazir of the Court made the following report: "In this case a notice in a registered cover was sent by post to the judgment-debtors. The cover has been returned to-day

by the post, open. The cover has a slip attached thereon, in which it is written, in Hindi, that Badri Nath, treasurer (that is one of the judgment-debtors), refuses to take it. Therefore, the cover in question is submitted with this petition." On the 3rd June, 1872, the case again came before the Subordinate Judge, upon which he made the following order: "The case having been brought forward, it appears that a notice in a registered cover was sent by post to the judgment-debtor at Indore, but, the judgment-debtors not having received the cover, it was returned. The judgment-debtors not having taken the cover containing the notice, it must be considered as having been served." It is therefore ordered: "That a report be endorsed on the decree, and made over to the decree-holder's pleader, that he may sue out execution in a competent Court, and recover the amount of his decree, and that the case be struck off the pending file."

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Afterwards, on the 24th December, 1873, upon a report of the muharrir that the record was not in the office, the Subordinate Judge made another order that the record should be sent for from the Judge's Court. Subsequently, on the 9th January, 1874, in a proceeding from which it appears that the record had been received and perused, the Subordinate Judge "ordered that the certificate prescribed by ss. 285 and 286, Act VIII of 1859, and copy of the application for execution of decree, be sent to the Agent at the Indore Cantonment." On the 9th April, 1874, the case was re-instituted in the Court of the Judge by petition, stating that the Subordinate Judge had not lost control of the case until 3rd June, 1872, that the decree-holders had a certificate on which they had not acted, and they prayed the Court that, under s. 237, certain 4 per cent. promissory notes for Rs. 25,000 due to the judgment-debtors in the Indore. Agency Cantonment Treasury might be attached. It appears that after some demur on the part of the Assistant Political Agent to execute the decree, he was ordered to execute it; and he did execute it by attaching a sum of Rs. 13,097 belonging to the judgment-debtors, and that money was sent to the Judge at Agra by means of a bill. On the 13th May, 1876, the Judge, having received the money from the Indore Agency, ordered that the Rs. 13,097-7-9 be given over to Mir Jaffar Husain,

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pleader for the decree-holder, agreeably to a power given to him, and a receipt be taken from him. Before the money was handed over, however, an application was made to the Judge, in which the defendants made the following objection, amongst others: "(i) That the decree-holder's decree is beyond time." Thereupon the Judge on the 18th May, 1876, made the following order: "The objections are such as may be entertained, and may possibly be determined in favour of the debtors. It appears, therefore, undesirable that the decree-holder should get the money till they have been disposed of. Let payment be stayed on the debtors giving security to pay interest at eight annas per mensem per cent., in the event of the money being ultimately awarded. If the cheque received from foreign territory have been already made over to the decree-holder, an injunction may be issued to the bank on which it is drawn, not to cash it till further orders." Then comes the decision of the 31st May, 1876, by which the Judge held that the proceedings in the Court of the Subordinate Judge were *ultra vires*, and did not prevent the running of limitation. He held that the transfer of the case to the Subordinate Judge was not authorised by law, and that when the Subordinate Judge removed the case from his files he could not take it up again without a fresh transfer. He also considered that the decree-holders had not shown due diligence in the case and doubted whether any of the proceedings were *bonâ fide*. He therefore held that he was constrained to grant the prayer of the objectors, and to award them costs.

The execution-creditors appealed to the High Court, and that Court upheld the decision. The Judges, however, stated that they saw no reason to think that the appellants had not exerted themselves *bonâ fide* to obtain their due. In that view their Lordships concur. But the High Court considered that the transfer to the Subordinate Judge, even if the Judge had power to make it, merely authorised him to take up and dispose of the application then pending and not the subsequent applications which were made to him. They further stated that they affirmed the order of the Judge with great reluctance.

There can be no doubt that the application to and orders of the Subordinate Judge if he had had jurisdiction would have been suffi-

cient to prevent the operation of the Statute of Limitations, and their Lordships are of opinion that, under the circumstances of the case, they had that effect, even if he had no jurisdiction. S. 14 of Act XIV of 1859 enacts : " In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bond fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation." It was, therefore, the object of the Legislature, at least with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, *bond fide* and with due diligence, before a Judge whom he may suppose to have had jurisdiction, but who yet may not have had jurisdiction. The question is, whether the same principle may not be applied to the construction of s. 20 of Act XIV of 1859, with regard to executions. S. 20 says : " No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order to keep the same in force, within three years next preceding the application for such execution." The Act does not say some proceeding in a Court having jurisdiction, and their Lordships are of opinion that a proceeding taken *bond fide* and with due diligence before a Judge whom the party *bond fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of s. 20.

In this case the Subordinate Judge did believe he had jurisdiction. Applications were made to him, and he made orders which would, if he had had jurisdiction, have been proceedings within the period of limitation. If the judgment-debtors had appeared before

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the Subordinate Judge, and had objected to his jurisdiction, he must have decided whether he had jurisdiction or not ; and if he had decided that he had jurisdiction, even though he had not, the proceedings would have been proceedings within the meaning of s. 20. They ought equally to be so, though the judgment-debtors did not appear or object to the jurisdiction.

There is one case which should be referred to, and that is the case of *Dhunput Singh Roy v. Mudhomotes Dabia* (1) reported in the 11th Bengal Law Reports, page 23. There, "An execution sale was stayed by consent for two months, and the execution-suit was struck off the file. During that period the execution-creditor applied to the Court to restore the execution-suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in another suit, alleging that he (the executing creditor) had attached them ; but it turned out that he had attached them in another suit. Held,—the application being *bond fide*, that the period of limitation began to run from the date of the disposal of the application by the Court." In delivering their judgment at page 31, the Judicial Committee said : "It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bond fides* of the proceeding. If their Lordships could infer from these facts that the petition was a colorable one, not really with a view to obtain the money ; if they could come to that conclusion, in point of fact, the proceeding would not be one contemplated by the statute ; but their Lordships cannot come to that conclusion." They therefore came to the conclusion that the proceeding, although abortive, was a proceeding within the meaning of the 20th section of Act XIV of 1859.

On the whole, therefore, their Lordships have arrived at the conclusion, and will humbly advise Her Majesty that the decree of the High Court was erroneous, and that it be reversed ; that in lieu

(1) 11 B. L. R., P. C., 23.

thereof an order be made reversing the order of the Judge of Agra of the 31st May, 1876, and ordering that the Rs. 13,097-7-9, with such interest as they may be entitled to under the order of the 18th May, 1876, be paid to the decree-holder; and that the appellants have the costs in all the lower Courts subsequent to the petition of objection of the 18th May, 1876, and the costs of this appeal.

Solicitors for the Appellant; Messrs *Watkins and Lattey*.

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## APPELLATE CIVIL.

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*April 22.*

*Before Mr. Justice Oldfield and Mr. Justice Straight.*

GULZARI LAL (DEFENDANT) v. JADAUN RAI (PLAINTIFF).\*

*Suit to establish Right to Attached Property—Jurisdiction.*

*Held* that, in the case where a person has preferred a claim to property attached in the execution of a decree, on the ground that such property is not liable to such attachment, and an order is passed against him, and he sues to establish his right to such property, the value of the subject-matter in dispute in such suit, for the purposes of jurisdiction, will be the amount of such decree. Second Appeal No. 320 of 1876, decided the 16th May, 1876 (1), followed.

THE plaintiff in this suit claimed a declaration of his proprietary right to certain wheat and gram valued at Rs. 1,200, and the cancellation of an order made by the Munsif of the city of Moradabad on the 17th May, 1876, disallowing his claim to the same. This grain had been attached by the defendant, when in the possession of the plaintiff, as the property of the defendant's judgment-debtor, in execution of a decree for Rs. 222-13-6. The suit was instituted in the Court of the Subordinate Judge of Moradabad, by whom the suit was dismissed. On appeal by the plaintiff the District Judge gave him a decree in respect of the wheat.

On appeal by the defendant to the High Court it was contended that the suit should have been instituted in the Munsif's Court, the value of the subject-matter in dispute being the amount of the decree

\* Second Appeal, No. 526 of 1879, from a decree of W. Young, Esq., Judge of Moradabad, dated the 6th February, 1879, modifying a decree of Maulvi Wajih-ul-lah Khan, Subordinate Judge of Moradabad, dated the 11th April, 1877.



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 under Rs. 1,000.

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Mr. Conlan, Munshi Hanuman Prasad, and Babu Ratam Chand,  
 for the appellant.

Pandit Bishambhar Nath and Shah Asad Ali, for the respon-  
 dent.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.)  
 was delivered by

OLDFIELD, J.—We are constrained to allow an objection taken  
 by appellant that the Subordinate Judge had no jurisdiction to  
 try this suit. The claim is to have declared the plaintiff's right to  
 some grain stored in pits, by setting aside an order of the Munsif  
 for bringing the grain to sale in execution of a decree held by  
 defendant against a third party, his judgment-debtor. A course of  
 decisions of this Court has held that the value of the subject-matter  
 in dispute for determining jurisdiction will be in such cases the  
 amount of the decree in satisfaction of which it is sought to bring  
 the property to sale. — S. A. No. 320 of 1876, decided the 16th May,  
 1876 (1). We decree the appeal and set aside the proceedings  
 in the lower Courts, and direct that the plaint be returned to the  
 plaintiff in order that he may, if so advised, present it in the proper  
 Court. Each party will bear their own costs in all Courts.

*Appeal allowed.*

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*Before Mr. Justice Pearson and Mr. Justice Straight.*

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 April 5.

BIKA SINGH AND OTHERS (DEFENDANTS) v. LACHMAN SINGH AND  
 OTHERS (PLAINTIFFS).\*

*Hindu law—Mitakshara—Mortgage by a father of ancestral property—  
 Sale of father's rights and interests in the execution of decree—  
 Liability of Son's share.*

The undivided estate of a joint Hindu family consisting of a father and  
 his minor sons and grandsons, while in the possession and management of  
 the father, was mortgaged by him as security for the re-payment of moneys  
 borrowed by him. The lender of these moneys sued the father to recover

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\* Second Appeal, No. 1170 of 1879, from a decree of W. Duthoit, Esq.,  
 Judge of Shahjahanpur, dated the 28th August, 1879, modifying a decree of  
 Babu Beeha Ram Chuckerbati, Munsif of Data Ganj, dated the 10th June,  
 1879.

(1) Unreported.

them by the sale of the family estate, and obtained a decree against him directing its sale. The right, title, and interest of the father only in the family estate was sold in the execution of this decree. The auction-purchasers having taken possession of the family estate, the sons and grandsons joined in a suit against them to recover their shares of the estate. *Held*, that the sons and grandsons were entitled to recover their shares of the estate, inasmuch as the auction-purchasers had only acquired by their auction-purchase the rights and interests of the father in the estate, and that, for the same reason, it was unnecessary to inquire into the nature of the debt on account of which the father's rights and interests in the estate were sold. *Deendyal Lal v. Jugdeep Narain Singh* (1) followed. *Girdharae Lall v. Kantoo Lall* (2) distinguished.

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*Held*, also that the rulings in those two cases are perfectly consistent.

THIS suit was instituted in the names of the plaintiffs, five of whom were the sons, and two the grandsons, of the defendant Gulab Singh, they being minors, by their next friend, Indra Kuar, wife of Gulab Singh. The plaintiffs claimed to establish their right to, and recover possession of, five-sixths of a defined share of a mauza called Kishorepur. It appeared that on the 17th February, 1876, Gulab Singh had given one Ganga Prasad a bond for the payment of Rs. 154 in which he hypothecated this share as collateral security for such payment. The principal amount of this bond consisted of an old loan of Rs. 54 and a new loan of Rs. 100. Ganga Prasad sued Gulab Singh on this bond and obtained a decree for the recovery of the bond-debt by the sale of the share. The rights and interests of Gulab Singh in the share were put up for sale in the execution of this decree, and of another decree against him and certain other persons held by one Lachmi Narain, on the 23rd August, 1878, and such rights and interests were purchased by the defendants in the present suit, who obtained possession of the share. The plaintiffs alleged in support of their claim that they and Gulab Singh formed a joint Hindu family; that the share was the undivided property of the family, although Gulab Singh was recorded as its proprietor in the revenue registers; that the moneys which Gulab Singh had borrowed from Ganga Prasad had been borrowed for unnecessary purposes; that the whole of the joint ancestral property had been improperly put up for sale for the satisfaction of Ganga Prasad's decree; and that, according to Hindu law, father and son had equal shares in such property;

(1) I. L. R., 3 Calc., 198. (2) L. R., 1 Ind. App., 321; 14 B. L., R., 187.

1880 and Gulab Singh's share was therefore one-sixth, and they were  
 BIKA SINGH entitled to the remaining five-sixths of the joint ancestral property  
 v. of the family.  
 LACHMAN SINGH.

The auction-purchasers defendants stated in defence of the suit that it had been brought at the instance of Gulab Singh ; that the property in suit was not ancestral property, but the separate property of Gulab Singh ; that Gulab Singh was a person of good moral character ; that the debts for the satisfaction of which the property had been sold were incurred by him for lawful purposes ; and that, as under the Hindu law it was the pious duty of the son to pay his father's just debts, and the property in suit had been sold to satisfy such debts, the suit ought to be dismissed. It appeared that before the suit came to be tried the defendant Gulab Singh died.

The second and third issues fixed by the Munsif were as follows:—“(ii). Whether the property in dispute was the joint ancestral property of the plaintiffs and Gulab Singh the father of plaintiffs, and Gulab Singh was in possession thereof as the head of the family or not? (iii). Whether the debt in satisfaction of which the property was sold had been incurred under a legal necessity or not, and what rights have the defendants acquired by the auction-purchase”? With reference to the first of these issues the Munsif found that the property in dispute was the ancestral property of Gulab Singh and his sons, and not the separate property of Gulab Singh, and that Gulab Singh was in possession of it as the head of the family, and that it was not shown how the moneys borrowed from Ganga Prasad had been expended. The Munsif held that it was not necessary to ascertain how these moneys were expended, as whatever might have been the nature of the debt the defendants could not take under the execution-sale more than the right, title, and interest of the judgment-debtor. The judgment of the Munsif on this part of the case was as follows:—“But this issue is immaterial in the present suit. This case is exactly on all-fours with *Deendyal Lal v. Jugdeep Narain Singh* (1) decided by the Judicial Committee of the Privy Council. In that case their Lordships held that whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the

(1) I. L. R., 3 Calc., 198.

execution-sale more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, *viz.*, the right, title and interest of the father.' This ruling is applicable to this case. The bond was executed by the father and the decrees obtained against him only. The plaintiffs who were not parties to the bonds were not also made parties to the suits in which the decrees were obtained in execution of which the property in suit was sold. Following the ruling of the Privy Council, I hold that the defendants Bika Singh, Narain Singh, Bahlwan Singh, Tika Singh, and Pulandar Singh have acquired by the auction-purchase merely the right, title, and interest of Gulab Singh to and in the property in dispute."

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The Munsif accordingly gave the plaintiffs a decree. On appeal the District Judge affirmed the Munsif's decision, but varied his decree. The material portion of the District Judge's judgment was as follows:—"The auction-purchasers appeal. The cases of *Girdharee Lall v. Kantoo Lall* (1), *Narayanacharya v. Narso Krishna* (2), *Venkatasami Naik v. Kuppaiyan* (3) have been cited on their behalf. The last-named precedent is so entirely at variance with their contention that it has probably been cited under a misapprehension. There can be no doubt, however, that the two first-noted precedents do support the appellants' case and lay down the rule that the sale of a father's ancestral estate in execution of a decree of Court will bind Hindu sons *in esse*, and there is no doubt that the property in this case was ancestral and that the sons were *in esse*. But there seems also to be no doubt that the principle enunciated in *Muddun Thakoor v. Kantoo Lall* (4) has been very materially varied by *Deendyal Lal v. Jugdeep Narian Singh* (5), which has been followed by two Madras Full Bench decisions,—*Venkatasami Naik v. Kuppaiyan* (3); *Venkataramayyan v. Venkatasubramania Dikshatar* (6)—in the latter of which the genesis of the law as now

(1) L. R., 1 Ind. App., 321; 14 B. L. R., 187. (4) L. R., 1 Ind. App. 321; 14 B. L. R., 187.

(2) I. L. R. 1 Bom. 263.

(5) I. L. R., 3 Calc. 198.

(3) I. L. R., 1 Mad., 354.

(6) I. L. R., 1 Mad. 358.

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settled is detailed, and it must I think now be taken as certain that, when the sons are not parties to the suit in which the decree is passed, the right, title, and interest of the father can alone be considered as sold in execution. I find, therefore, no reason to differ from the lower Court upon the main point in this case, but I am of opinion with reference to the case of *Babaji Lakshman v. Vasudev Vinayak* (1) and *Kallapa v. Venkatesh Vinayak* (2) that the decree must be varied, and that its form should be in that given in *Babaji Lakshman v. Vasudev Vinayak* (1). The lower Court's decree is modified by declaring the plaintiffs entitled to joint possession along with the defendants of Gulab Singh's share in the zamindari estate of mauza Kishorepur. The relative proportions of their interests, if a division *in specie* be desired, must be determined in a suit to ascertain the same or by private arrangements."

The defendants appealed to the High Court.

Pandit *Bishambhar Nath* and Munshi *Sukh Ram*, for the appellants.

Munshi *Hanuman Prasad*, for the respondents.

The judgment of the High Court (PEARSON, J., and STRAIGHT, J.) was delivered by

PEARSON, J.—In the case of *Girdharee Lall v. Kantoo Lall* (3) and *Muddun Thakoor v. Kantoo Lall* (3) decided by the Privy Council on the 12th May, 1874, it was ruled that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him, that it would be a pious duty on the part of the son to pay his father's debts, unless they had been illegally contracted or for immoral purposes, and that, it being a son's pious duty to pay his father's debts, the ancestral property in which the son as the son of his father, acquires an interest by birth, is liable to the father's debts. In the later case of *Suraj Bunsu Koer v. Sheo Persad Singh* (4), decided by the Privy Council on the 1st

(1) I. L. R., 1 Bom., 95.  
 (2) I. L. R., 2 Bom., 676.

(3) L. R. 1 Ind. App. 321; 14 B. L. R., 187.  
 (4) I. L. R. 5 Calc., 148.

February, 1879, reference is made to the above-mentioned decision as an authority for the following proposition, *viz.*, that when a joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted.

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In the case of *Deendyal Lal v. Jugdeep Narain Singh* (1) decided by the Privy Council in July 1877, it was ruled that the right and interest of one co-sharer in a joint ancestral estate may be attached and sold in execution of a decree obtained against him personally under the Mitakshara law, and that the purchaser at such a sale acquires merely the right to compel a partition as against the other co-sharers which the judgment-debtor possessed.

The rulings in the two cases of 1874 and 1877 appear to be perfectly consistent, and, in our opinion, the lower appellate Court has erred in holding that they are at variance with each other, and that the decision in the earlier case supports the appellants' contention. In that case the whole of the taluqa in which the plaintiffs were co-sharers had been sold by their fathers. The ruling in that case is therefore inapplicable to the present in which it has been distinctly found that the appellants only acquired by their auction purchase the rights and interests of their judgment-debtor Gulab Singh in the joint ancestral estate in mauza Kishorepur. That finding assimilates the case to that of *Deendyal Lal v. Jugdeep Narain Singh* (1).

The reason why it is unnecessary to inquire into the nature of Gulab Singh's debts on account of which his rights and interests were sold is that the rights and interests of the plaintiffs are found not to have been sold to the appellants. The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) L. L. R., 3 Calc., 198.

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April 12.

## CRIMINAL JURISDICTION.

*Before Mr. Justice Straight.*

**EMPRESS OF INDIA v. DEOKI NANDAN LAL.**

*Offence against the Stamp Laws—Act XVIII of 1869 (Stamp Act), s. 34—  
Act I of 1879 (Stamp Act).*

The Collector, being primarily responsible for the prosecution of offences against the Stamp Acts of 1869 and 1879, should not himself try, as a Magistrate, a person accused of an offence against either of those Acts.

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioner, the purchaser of certain property, had sued the vendor, one Amirta, on the deed of sale, in the Court of the Subordinate Judge of Gorakhpur. This suit having been dismissed by the Subordinate Judge, the petitioner appealed to the District Judge. The District Judge dismissed the appeal, and being of opinion that the full amount of the consideration-money was not stated in the deed, directed the District Magistrate to prosecute the petitioner for an offence under s. 34 of Act XVIII of 1869. The District Magistrate accordingly placed the petitioner on his trial, and finding that the full consideration-money indirectly secured by the deed was not truly stated in that document, convicted him of an offence under s. 34 of Act XVIII of 1869. The petitioner appealed to the District Judge. The appeal was transferred for trial to the District Judge of Benares by whom the Magistrate's order was affirmed. Thereupon the petitioner preferred the present application.

Babu Sital Prasad Chatterji, for the petitioner.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

STRAIGHT, J.—The applicant in this case was convicted by the officiating Magistrate and Collector of Gorakhpur of an offence against s. 34 of Act XVIII of 1869, for not having truly set forth in a sale-deed executed by him to one Amirta the full amount of consideration-money thereby secured, and was ordered to pay a fine of Rs. 135. He appealed to the Sessions Judge of Gorakhpur, but under the order of this Court his appeal was transferred for hearing to the Judge of Benares, who on the 3rd February,

1880, dismissed it. He now applies to this Court under s. 297 of the Criminal Procedure Code upon the following grounds :—(i) That a conviction could not properly be had in the absence of the original principal document ; (ii) that the Officiating Magistrate and Collector, being by s. 43 of Act XVIII, the actual prosecutor of the case, should not have sat to hear and dispose of it in his judicial capacity.

Dealing with this latter objection first, I am of opinion it is a well-founded one and should prevail. Both the Stamp Acts of 1869 and 1879 recognise the Collector as primarily responsible for the institution of prosecution for offences against those Acts, except where the Local Government generally, or he himself specially, has authorised some other officer to discharge such duty. The letter of the Officiating Judge of Gorakhpur of the 1st September 1879, and the *rubkar* directing an inquiry under the Stamp Act of 1869 against the present applicant and Amirta were amply sufficient to justify proceedings. But the Officiating Magistrate and Collector should have detailed the case for hearing and disposal to some other qualified Magistrate, more especially when it was almost impossible for him to prevent his mind being influenced by the very forcible language in which the Officiating Judge had couched his letter of 1st September, 1879. The conviction must be quashed and a new trial had before such Magistrate, as the now Officiating Judge of Gorakhpur may select.

(The learned Judge then proceeded to deal with the first point urged on behalf of the applicant.)

## APPELLATE CIVIL.

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April 12.

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

JAGAT NARAIN AND ANOTHER (DEFENDANTS) v. QUTUB HUSAIN  
(PLAINTIFF).\*

*Mortgage—Contribution.*

In March 1864 the owner of an estate mortgaged it as security for the payment of certain moneys. Subsequently portions of such estate were purchased by the plaintiff and the defendants at an execution-sale. Subse-

\* Second Appeal, No. 1172 of 1879, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 19th April 1879, affirming a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 19th July 1878.



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quently again the mortgagee sued the mortgagor and the plaintiff for the mortgage-money, claiming to recover it by the sale of the portion of such estate purchased by the plaintiff. Having obtained a decree, the mortgagee caused a portion of such portion to be sold in the execution of the decree. In order to save the remainder of such portion from sale in the execution of the decree, the plaintiff satisfied the judgment-debt. The plaintiff then sued the defendants for contribution. *Held* that, assuming that the mortgagee, by not including the defendants in his suit upon the mortgage-bond, had put it out of his power to proceed at law by another suit on the basis of the same bond against the properties in the possession of the defendants as purchasers, it did not follow that the plaintiff's equitable right to recover a fair contribution from the defendants on the ground of his having paid the whole debt due to the mortgagee was thereby invalidated.

On the 23rd March 1864, one Dildar Husain, the owner of an estate called taluqa Asad-ul-lahpur, gave one Ilahi Bakhsh a bond for the payment of certain moneys in which he hypothecated taluqa Asad-ul-lahpur as collateral security for such payment. Ilahi Bakhsh brought a suit on this bond in which, claiming to recover the money due thereon by the sale of the taluqa, he made Qutub Husain, the plaintiff in the present suit, and one Alopi Din, who had in the meantime each purchased a portion of the taluqa at an execution sale, defendants. Having obtained a decree, Ilahi Bakhsh caused a portion of the property purchased by the plaintiff, and the property purchased by Alopi Din, to be put up for sale in execution of the decree. The portion sold of the property in the plaintiff's possession realized Rs. 1,800, and the property in Alopi Din's possession realized Rs. 200. In order to save the remainder of the property in his possession from sale, the plaintiff paid the balance of the judgment-debt. In the present suit he claimed contribution from the defendants, who had purchased portions of taluqa Asad-ul-lahpur at the same execution-sale at which he had purchased, in proportion to the value of the portions which they had purchased, claiming to recover such contributions by the sale of such portions. Both the lower Courts gave the plaintiff a decree.

On appeal by three of the defendants it was contended on their behalf that, inasmuch as in the suit brought by Ilahi Bakhsh he had not made them defendants or sought to enforce his lien on the portions of the taluqa in their possession, such portions were not lawfully chargeable with the judgment-debt at the time the plaintiff satisfied it, and consequently were not liable to contribution.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji),  
or the appellants.

The *Senior Government Pleader* (Lala Juala Prasad) and Pandit  
Ajudhia Nath, for the respondent.

The judgment of the Court (PEARSON, J., and SPANKIE, J.)  
was delivered by

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PEARSON, J.—The argument set out in the ground of appeal  
is more ingenious and plausible in appearance than agreeable in  
substance to reason and equity. The contention is that the prop-  
erties purchased by the defendants-appellants, which were equally  
with that purchased by the plaintiff subject to the lien created by  
the bond executed on the 23rd March 1864 by Dildar Husain  
in favour of Ilahi Bakhsh, were released from liability because  
they were not included in the suit brought by the latter for the  
recovery of the bond-debt by enforcement of the lien. But the  
contention seems to be irreconcilable with the doctrine of contribu-  
tion expounded in Story's Equity Jurisprudence. Assuming that  
Ilahi Bakhsh by the frame of his suit above mentioned had put  
it out of his power to proceed at law by another suit on the basis  
of the same bond against the properties in the possession of the  
defendants in the present suit as purchasers, we are not prepared  
to admit, as a necessary consequence of such assumption, that the  
plaintiff's equitable right to recover a fair contribution from the  
defendants on the ground of his having paid the whole debt due  
to Ilahi Bakhsh is thereby invalidated. The appeal is dismissed  
with costs.

*Appeal dismissed.*

## FULL BENCH.

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April 12.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr.  
Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

GANGA SAHAI AND ANOTHER (DEFENDANTS) v. HIRA SINGH  
(PLAINTIFFS).\*

*Award—Estoppel—Hindu law—Inheritance—Act I of 1872  
(Evidence Act), s. 115.*

*D*, who was the natural brother of *H*, but had been adopted into another  
family, on the one part, and *G*, on the other part, referred to arbitration a

\* Second Appeal, No. 782 of 1879, from a decree of B. M. King, Esq.,  
Judge of Meerut, dated the 9th May 1879, reversing a decree of Babu Kashi  
Nath Biswas, Subordinate Judge of Meerut, dated the 24th December 1877.

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dispute between them concerning the succession to the estate of *S*, the father of *D* and *H*. *H*, having been born deaf and dumb, was under Hindu law incapable of inheriting his father's estate, and he was not a party to the arbitration proceedings. The award, to which *G*, after it was made, expressed his assent in writing, declared that *H* was the heir to his father's estate.

*Held* (SPANKIE, J., dissenting), in a suit by *H* against *G* for possession of a portion of his father's estate, that the plaintiff, not being a party to the award, was not bound thereby, and, not being bound thereby, could not claim to take any advantage therefrom; that the award could not confer on him a right which he did not possess by law, nor could it constitute evidence of a right which the law disallowed; that the assent of the defendant to the award could not convey to the plaintiff a right of inheritance which did not devolve on him by law; that it could not be contended that the defendant had made a gift of the property to the plaintiff, inasmuch as it had been adjudged by the award that the property did not belong to the defendant; that the defendant by his assent to the award was not estopped from questioning the plaintiff's right of inheritance by the provisions of s. 115 of Act I of 1872; and that, under these circumstances, the plaintiff could not succeed in his suit.

THIS was a suit for possession of a two-thirds share of seven houses situated in a mauza called Asaura. The plaintiff, Hira Singh, stated in his plaint that the houses were the undivided property of the parties to the suit; that he was entitled to a two-thirds share of the houses, and the defendants to a one-third share; that he desired a partition of the property; and that the cause of action arose in July 1876, when the defendants refused to make a partition of it. It appeared that in 1874 a dispute arose between the defendants and certain other persons, on the one part, and Debi Singh, brother of the plaintiff, and adopted son of one Hulas Rai, deceased, on the other part, as to the succession to the estates of Rup Kuar, deceased, widow of Hulas Rai, and of Har Dial, deceased, father of Debi Singh and the plaintiff. On the 26th December 1874, the parties agreed to refer the matters in dispute to arbitration, the points referred being—“(i) as regards the legal heir to the property left by Rup Kuar, deceased,” and “(ii) as regards the heir now and hereafter to the property left by Har Dial.” The arbitrator by his award dated the 4th January 1875, determined on the first point that Debi Singh, as the adopted son of Hulas Rai, was the lawful heir to the property of Hulas Rai and Rup Kuar. On the second point the arbitrator determined as follows:—“Har Dial died in 1871, and then the name of Hira

Singh alone (Debi Singh having been adopted by Rup Kuar), who, though dumb, was the sole heir, was entered in the column of proprietorship, and he is in proprietary possession of the property, and enjoys the entire profits thereof. The parties admit that Hira Singh is the exclusive heir and possessor of the property left by Har Dial. Therefore, Hira Singh should, in my opinion, continue to be the owner and possessor of the entire property, as he is, and that, after him, his issue will become owners; that if (God forbid) he has no issue, the said property also will devolve on Debi Singh and his descendants; and that the first party or their descendants will have no right whatsoever to the property left by Har Dial, moveable or immoveable, under any precept of the Hindu law, or according to any legal principle, in the present time, or in future, on any allegation, against Hira Singh and Debi Singh, and their issue." This award was signed by the defendant Amin Singh for himself and the defendant Ganga Sahai. On the same day as the award was given, *vis.*, the 4th January 1875, the defendants executed a "*rasi-nama*," in which after reciting the agreement of the 26th December 1874, and the award, they stated as follows: "He (the arbitrator) has recorded a clear finding in the award, which was read to us, word by word, and we have fully understood it, and being in a sound state of mind and reason, we have agreed to it, with free will and consent and without reluctance and coercion; and having assented to it, we have attached our signatures as showing our consent to and our acceptance of it. We have now no objection whatever to the award, and have not, nor shall have any claim now or in future to the inheritance and the property. We have therefore executed this *rasi-nama* to serve as a document."

The present suit was instituted by the plaintiff in November 1876. The property of which he claimed a two-thirds share formed part of Har Dial's estate.

The defendants contended, *inter alia*, that the plaintiff was not entitled to succeed to his father's estate, being deaf and dumb and an idiot from his birth. The Subordinate Judge fixed for trial the following amongst other issues:—(i) "Are defendants bound as against the plaintiff by the award of arbitration in respect to the inheritance of Har Dial;" (ii) "If so, can defendants urge the pleas of

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 HIRA SINGH. plaintiff's incapacity to succeed ;" (iii) " Is plaintiff born an idiot, and whether by his idiocy, or by his having been born deaf and dumb, he has forfeited his right to inherit the properties." The Subordinate Judge held as follows with reference to the first and second issues : " On the first point the Court thinks that, as the plaintiff was not a party to the reference to private arbitration, he could not benefit by the award, as much as the defendants could not be bound by it, so far as the plaintiff's right was declared in it. Debi Singh, the younger brother of the plaintiff, who was adopted into another family, did not and could not represent him in that reference to arbitration, and if the award was unfavourable to plaintiff, it could not be said that the plaintiff would be bound by it. It would be contrary to all the rules of equity and law to give the plaintiff the advantage of the award, when he would not have been bound by it if it were unfavourable to him. I do not also find any such admission on the part of the defendants so as effectually to stop their mouths and to prevent them urging a plea of bodily or mental infirmities disqualifying the plaintiff from inheritance. This finding disposes of the second issue also." On the third issue the Subordinate Judge held that, it being admitted that the plaintiff was born deaf and dumb, he had no right of inheritance in his father's estate. In accordance with the determination of these issues the Subordinate Judge dismissed the suit.

On appeal by the plaintiff the District Judge on the 6th June 1878, treating the case as having been disposed of by the Subordinate Judge on a preliminary point, and holding that the defendants were bound by the award, reversed the decision of the Subordinate Judge and remanded the case for re-trial. On appeal by the defendants, the High Court, on the 17th January 1879, set aside the District Judge's order remanding the case, and directed him to dispose of the whole case according to law. The District Judge accordingly proceeded to dispose of the case, and on the 9th May 1879 gave the plaintiff a decree.

The defendants appealed to the High Court. On their behalf it was contended, *inter alia*, that the plaintiff, not having been a party to the reference to arbitration could not benefit by the award, and

the defendants were not bound by it, in so far as the plaintiff's right was declared by it ; that Debi Singh did not, and, having been adopted into another family, could not, represent the plaintiff in the reference to arbitration ; and that there had been no such admission on the part of the defendants as estopped them from contending that the plaintiff was disqualified from inheriting.

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The Division Bench (PEARSON, J., and SPANKIE, J.) before which the appeal came for hearing referred it to the Full Bench, the order of reference being as follows :

SPANKIE, J.—In this case the claim was not to establish a right to inherit a share of the paternal property, but to obtain separate possession by partition of certain houses situate in mauza Asaura, in proportion to the share of the landed property already in plaintiff's possession since the death of his father in 1871. There does not appear to be any dispute regarding the family tree. But a quarrel arose between the plaintiff's brother Debi Singh and the defendants in 1874 as to the succession to the properties left by Hulas Rai and Har Dial. The plaintiff is the elder brother of Debi Singh, but he is deaf and dumb from his birth, and thereby under the Hindu law admittedly disqualified from inheritance. Debi Singh is said to have been adopted by Rup Kuar, the wife of Hulas Rai, probably by the permission of her husband, as the adoption seems to have been recognized. It would appear that in 1874 defendants were objecting to Debi Singh putting in any claim to his own father's property, because of his adoption into Hulas Rai's family, and that the real subject of dispute between themselves and Debi Singh was Har Dial's property. Har Dial was father of the plaintiff. Debi Singh and defendants submitted their quarrel to the arbitration of Zalim Singh, whose award is dated 4th January 1875. The award distinctly states that the question of succession to the property left by Rup Kuar, wife of Hulas Rai, is beside the real quarrel, which was, "who ought to be now and for the future the heir to the property left by Har Dial, deceased." The arbitrator found that "when Har Dial died in 1871, on account of Debi Singh being the adopted son of Rup Kuar, the name of Hira Singh (present plaintiff) was alone entered in the revenue papers as heir of his father, and he, although he is dumb, alone is in proprietary

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possession of the estate and receives the income of the estate. The parties admit that Hira Singh is the sole heir and in possession of the property left by Har Dial and I am of opinion, therefore, that Hira Singh alone should, as heretofore, hold proprietary possession of the property, after him his male heirs will be the proprietors. If, may God forbid it, there be no male heirs, that inheritance will also devolve on Debi Singh and his descendants." The award then declares "that the first party (the present defendants), or their descendants, shall not be competent now, in future, on any plea whatever, to claim any right to moveable or immoveable property left by Har Dial." The award was signed by Amin Singh for himself and party. They subsequently executed a compromise in the matter of their quarrel in which they declare as follows: "The award was read to us, word by word, and we have fully understood it, and being of sound mind and in possession of our senses, we have agreed to its terms, and signified our assent to them, with free will and consent and without coercion, and have attached our signatures as showing our consent to and our acceptance of it. We have no objection to the finding of the arbitrator as to the person declared entitled to inherit the property now and for the future. We have therefore &c."

It is true that Hira Singh was not made a party to the reference to arbitration; that he was not so is probably due to the fact that he was deaf and dumb, and perhaps to the circumstance that Debi Singh was really his manager. It may be said that this is a pure assumption. But I find on record that nearly five years before the award, Hira Singh, plaintiff, was made lambardar in this very village of Asaura "under the management of Debi Singh." In the same way, in cases of infancy, or the nomination of a woman to a lambardari, some person is added as "sarbarakar" or "manager." At this time Hira Singh was already, according to the award, in possession of Har Dial's share, and though disqualified under the Hindu law, as not being a son competent to perform the obsequies of his father, he does not appear to have been regarded as incompetent as a man of business with his brother as manager for him. I cannot deny that the plaintiff, if suing for a share of his inheritance from his father, is disqualified by the Hindu law. But

he is not suing now for any such share. He is, rightly or wrongly, with reference to the Hindu law, in possession of the paternal estate, and all that he seeks in regard to the houses is a separation of his interest from the interests of the defendants. In supporting his claim, I think that he is at liberty to use the award and compromise of defendants in the former quarrel as evidence in his own favour and against defendants; for the award and the compromise alike expressly determine and acknowledge his right to retain possession over his father's property. The defendants appear to have confirmed that possession. In a suit for possession in the Calcutta High Court, where plaintiff put in a copy of a compromise to which defendant was not a party, it was held that, although no question of right or title could be decided adversely to the defendant on the basis of that agreement, yet it would be evidence that by an order of Court passed on the compromise the plaintiff was put in possession(1). I do not say that the award, as such, is conclusive against the defendants in the present suit, but it may be that the award and compromise might be proved in this case, and the defendants might be examined upon both documents. The Court would have to determine what weight was to be attached to them in the present suit in proof of the plaintiff's claim. The award finds the fact that Hira Singh was in sole possession in 1875 of his father's property, and that he had been so since the death of his father in 1871. It is a confirmation of that possession rather than a declaration of his title under Hindu law. It states, as a fact, that although he is dumb, he alone is in proprietary possession of the estate, that is I suppose, ostensible proprietary possession, and receives the income of the whole estate. The parties admit that he is recorded as heir and in possession of the property, and the award of the arbitrator is thus made: "I am of opinion, therefore, that Hira Singh alone should, as heretofore, hold proprietary possession of the property left by Har Dial."

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The compromise is practically a cession of their own claim by the defendants in favour of Hira Singh. The award and the compromise likewise appear to have been acted upon, as Hira Singh remained as heretofore in possession of the property, and it may be

(1) *Sreemutty Dossee v. Pelaram Dossee*, 15 W. R., 261.



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 HIRA SINGH. that the cession by the defendants in favour of the plaintiff may confer, *as far as they are concerned*, a new title upon him, and that he may take henceforth by cession what he could not have inherited under the Hindu law. But the question is one of considerable difficulty, and I am desirous of obtaining the opinions of my honorable colleagues on the point. I would suggest that we should refer the case to a Full Bench.

The difficulty I feel is, whether or not, under the circumstances of this case, the plaintiff's claim must necessarily fail because the Hindu law disqualifies him from inheritance, or whether the award and compromise may not, if property proved, be used as evidence against the defendants in favour of the plaintiff's case, and whether, if proved, they may not also be evidence of a family arrangement, or cession of claim by the defendants, which might be enforced as against the defendants, although the plaintiff, on the death of his father, had no title under the Hindu law to succeed to his father's property.

PEARSON, J.—I was prepared to deliver judgment in this case, but in deference to the wish expressed by my honorable colleague I assent to his proposal to refer the case to a Full Bench.

Mr. Ross and Pandit *Nand Lal*, for the appellants.

Mr. Conlan, Munshi *Hanuman Prasad*, and Pandit *Bishambhar Nath*, for the respondent.

The following judgments were delivered by the Full Bench :

PEARSON, J.—The plaintiff in this suit claimed to obtain separate possession by partition of a share which he alleged to belong to him by right in certain houses being ancestral property. The exact nature of his right he did not define. But it is not disputed and is not open to dispute that he is not entitled to the share or any share in the property in question by right of inheritance, inasmuch as he was admittedly born deaf and dumb and incapable of inheriting property under the Hindu law. The ground on which the lower appellate Court has allowed his claim is that his right as heir to his father's estate was declared by an award dated 4th January 1875, to which the defendants in the present suit assented. The plaintiff

was not himself a party to the agreement to refer to arbitration the question who was Har Dial's heir, and the Judge is wrong in supposing that Debi Singh, the plaintiff's natural brother, agreed to the arbitration as his guardian and represented him before the arbitrator. The award could only bind the parties to the arbitration, and the plaintiff, not being a party thereto, is not bound by it, and, not being bound by it, cannot claim to take any advantage from it. It could not confer on him, who was not a party to the arbitration, a right which he did not possess by law, nor can it constitute evidence of a right which the law disallows. The award does not profess to be based on the Hindu law, but rather seems to have been wilfully made in contravention thereof. Nor could the defendants' assent to the award convey to him a right of inheritance which did not devolve on him by law. The lower appellate Court is mistaken, I conceive, in holding that either they, or the arbitrator, could by any thing done by them in the arbitration proceedings bestow on the plaintiff, who was not a party to them, a right which the law has refused to him, the law notwithstanding, and could cure the legal defect in his title. It has been urged and may be granted that a person who was not originally a party to arbitration proceedings may subsequently become a party to them ; but it does not appear that the plaintiff ever became a party to the proceedings which terminated in the award dated 4th January 1875. Had the award recognised the defendants' right to the inheritance, they might doubtless have made a gift of the property or any portion of it to him ; but it seems impossible to contend that they could make a gift of what was adjudged not to belong to them.

The circumstance that he may have been allowed to continue as before in joint possession of the property is explained by the consideration that he is, under the Hindu law, though excluded from inheritance, entitled to maintenance. It has been suggested that the defendants, by their assent to the award, are estopped from questioning the plaintiff's right of inheritance in this suit by the provisions of s. 115 of the Indian Evidence Act ; but that section, which is understood to embody the rule of the English law, seems to me to be inapplicable. "The doctrine of estoppel," says Mr. Justice Story, "is based on a fraudulent purpose and a fraudulent

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result. If, therefore, the element of fraud be wanting, there is no estoppel. There must be deception and change of conduct in consequence." Now it can hardly be contended that the defendants in expressing their acquiescence in the award intended to deceive the plaintiff or that he was deceived thereby, and led to take any action which has put him in a different position from that which he occupied before in respect of the property in suit. The plaintiff then having no right in him either by the law of inheritance or under the award, or by reason of any conveyance made in his favour by the defendants, cannot possibly succeed, if they be not estopped from calling his right in question.

I conclude, therefore, that the Court of first instance rightly decided the first three of the issues laid down by it for trial and rightly dismissed the suit.

I must add that the Zila Judge failed to apprehend rightly this Court's order of the 17th January last, which directed him to dispose of the case according to law. The law by which his procedure should have been regulated is contained in ss. 565, 566, and 567, Act X of 1877.

I would decree the appeal with costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

STUART, C. J.—The judgment of Mr. Justice Pearson in this case is so entirely satisfactory to my mind that I cannot hesitate to express my concurrence in it. A distinction at the hearing appeared to be taken between incapacity to take by inheritance and the capacity to enjoy by permitted actual possession of property, and the conduct of some members of Hira Singh's family would appear to recognise a legal status in him for that purpose. But that does not get rid of the disability which cannot from its nature be removed. Hira Singh is entitled to maintenance, but he has not other rights or status whatever. The appeal must, therefore, be disposed of according to the order proposed by Mr. Justice Pearson.

OLDFIELD, J.—I concur.

STRAIGHT, J.—I entirely concur in the judgment of Mr. Justice Pearson.

SPANKIE, J.—I retain the opinion I have already expressed, and hold that the documents referred to may be used in evidence by the plaintiff. I do not think that the circumstance that he is deaf and dumb disqualifies him necessarily from bringing the suit. This is not a claim to establish his right to succeed as heir of his father. Were it so, the suit would fail, as he could not succeed as heir under the Hindu law. But if he can show as against the defendants that they have recognised his possession, and confirmed it by ceding their own claims in his favour, there is nothing to prevent his doing so : a gift in favour of a deaf and dumb man would seem to be valid.

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*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

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**THAKUR OF MASUDA (PLAINTIFF) v. THE WIDOWS OF THE THAKUR OF NANDWARA (DEFENDANTS).\***

*Reference to the High Court by the Chief Commissioner of Ajmere and Mairwara—Ajmere Courts Regulation I of 1877, ss. 17, 18, 21, 36, 37—Reference to Chief Commissioner by Commissioner of Ajmere—Appeal from Commissioner's decree made in accordance with Chief Commissioner's judgment.*

On an appeal from a decision in a civil suit of the Assistant Commissioner of Ajmere to the Commissioner of Ajmere, the latter, feeling doubtful on a question of the nature specified in s. 17 of the Ajmere Courts Regulation I of 1877, referred such question, under s. 36 of that Regulation, to the Chief Commissioner of Ajmere and Mairwara. The Chief Commissioner dealt with the case as prescribed in s. 37 of that Regulation, and returned it to the Commissioner, who dismissed the suit in accordance with the Chief Commissioner's judgment. The plaintiff preferred an appeal to the Chief Commissioner from the Commissioner's decision. The Chief Commissioner did not make any order on the memorandum of appeal admitting it, or directing that it should be registered, or that the respondent should be summoned, or that the appellant should appear on a certain day under s. 551 of Act X of 1877 ; but issued a notice to the appellant's counsel to appear on a certain day. The appellant's counsel appeared on that day, and the Chief Commissioner intimated that he was acting under s. 551 of Act X of 1877. The appellant's counsel then proceeded to address the Chief Commissioner, and was heard for some time, and then stopped, in consequence of the Chief Commissioner resolving to refer to the High Court the question

\* Reference, No. 4 of 1880, by the Chief Commissioner of Ajmere and Mairwara.

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whether the appeal from the Commissioner's decision lay to him or to Her Majesty in Council. The Chief Commissioner subsequently referred such question to the High Court.

*Held* by the Full Bench (SPANKIE, J., dissenting), on a reference by the Division Bench before which the Chief Commissioner's reference came, that such question arose "in the trial of an appeal" within the meaning of s. 21 of the Ajmere Courts Regulation I of 1877, and was properly referred to the High Court.

*Held* by the Division Bench (SPANKIE, J., and STRAIGHT, J.) that the appeal from the Commissioner's decision lay, in this particular case, not to the Chief Commissioner, but to Her Majesty in Council.

THIS was a reference to the Full Bench by a Division Bench (SPANKIE, J., and STRAIGHT, J.) of the High Court before which a reference to the High Court by the Chief Commissioner of Ajmere and Mairwara, under s. 21 of the Ajmere Courts Regulation, 1877, came for disposal. The points of law referred by the Chief Commissioner to the High Court, and by the Division Bench to the Full Bench, appear from the Division Bench's order of reference, which was as follows :—

SPANKIE, J.—I feel great difficulty in disposing of this reference. The Chief Commissioner of Ajmere and Mairwara has, under s. 21 of the Ajmere Courts Regulation I of 1877, asked for a ruling from this Court on the case stated as follows :—

On an appeal from the decision of the Assistant Commissioner of Ajmere, the Commissioner feeling doubtful on a point of the nature specified in s. 17 of the above Regulation, referred the point under s. 36 to the Chief Commissioner. The Chief Commissioner dealt with the case as prescribed in s. 37, and returned it to the Commissioner, who disposed of it in accordance with the Chief Commissioner's judgment. Upon this, the plaintiff-appellant, considering that the Commissioner's decision, in accordance with that of the Chief Commissioner's judgment on the point referred, was final, applied to him for a certificate to appeal to Her Majesty in Council. The Commissioner did not consider his judgment to be final within the meaning of s. 595 of the Civil Procedure Code, and therefore declined to entertain the application for a certificate. Appellant then filed an appeal in the Chief Commissioner's Court against the judgment of the Commissioner,

passed in accordance with the ruling of the Chief Commissioner. The Chief Commissioner is doubtful whether he ought to proceed with the appeal, as it may be that the Commissioner's decision was final for the purposes of s. 595, Civil Procedure Code, and that therefore the application for a certificate should have been entertained by that officer. The question referred is, "Should the Commissioner's decree, given in conformity with the Chief Commissioner's ruling, be considered final for the purpose of an appeal to Her Majesty in Council?"

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The wording of s. 21, Regulation I of 1877 (The Ajmere Courts Regulation, 1877) is expressed thus:—"When an appellate Court in the trial of a civil appeal entertains a doubt in respect of a question of the nature specified in s. 17, such Court may refer such question in manner provided by s. 18;" and a reference under the section shall be dealt with in the manner provided by ss. 19 and 20.

The nature of the question specified in s. 17 is (i) doubt on a question of law; (ii) usage having the force of law; or (iii) the construction of any document; (iv) the admissibility of any evidence affecting the merits of the case; and it will be observed from the wording of s. 21 that the doubt must be entertained by the appellate Court making the reference "in the trial of a civil appeal."

The doubt would seem to be on one of the four points arising within the case itself, and it must arise in or on the trial of the appeal. It is clear that the Chief Commissioner has not as yet proceeded to the trial of the appeal. The case has been formerly entered as an appeal, but the doubt has not arisen in trial, on the pleadings or otherwise, as far as I am in a position to judge. The doubt was in the Commissioner's mind rather than in that of the Chief Commissioner, in whose Court the appeal is pending. The Chief Commissioner is himself of opinion that the appeal lies direct to the Privy Council from the Commissioner's judgment passed under s. 37.

I am disposed to think that the Chief Commissioner ought himself to determine, at the hearing, whether or not the Commissioner's decree having been appealed to him, the appeal is or is

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not cognizable in his Court. The question seems to me merely one of procedure, and not strictly one of those questions arising in a case specified in s. 17, and one of which must give rise to the doubt to be referred when the appellate Court is actually trying the case.

I would suggest that we ask the Full Bench of this Court to settle the preliminary doubt entertained. If the Court at large hold that the question was properly referred, there will be no difficulty in determining the question submitted to us.

.STRAIGHT, J.—I concur in the suggestion of Mr. Justice Spankie, that the preliminary question should be referred to the Full Bench.

Mr. Colvin and the *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the plaintiff.

Babu Ratan Chand, for the defendants.

The following judgments were delivered by the Full Bench :

STUART, C.J.—The question referred to us by the Division Bench (SPANKIE, J., and STRAIGHT, J.) is whether, under the circumstances, the reference by the Chief Commissioner to this Court was competently made. As the record shows, the case proceeded on its course at Ajmere until it came before the Chief Commissioner on appeal from the Commissioner. It was stated to us by Mr. Colvin that notice had been given that the appeal would be heard by the Chief Commissioner, under s. 551 of the Code of Procedure, and that he himself appeared on that notice, and he was arguing the case on that footing when the Chief Commissioner stated that he entertained a doubt whether the appeal was validly before him, or whether the judgment of the Commissioner must not be regarded as a final one, and as such the judgment to be appealed to Her Majesty in Council. The Division Bench are on their part doubtful whether the Chief Commissioner could make such a reference to this Court and themselves refer their doubt to this Full Bench.

S. 21 of the Ajmere Regulation I of 1877 provides that “when any Appellate Court on the trial of a civil appeal entertains a

doubt in respect of a question of the nature specified in s. 17, such Court may refer such question in manner provided by s. 18." The question referred to in s. 18 is a question of the nature specified in s. 17, and must therefore be "a question of law, or usage having the force of law, or the construction of any document, or the admissibility of any evidence affecting the merits of the case." Upon these provisions of the Regulation two questions arise, (i) whether the Court of the Chief Commissioner was under the circumstances an Appellate Court within the meaning of the section, and (ii) whether the proceeding before the Chief Commissioner was in the nature of a "trial" of a civil appeal. My answer to the first question is that the Chief Commissioner's Court was clearly an Appellate Court within the meaning of s. 21, and in the second place that the proceeding before the Chief Commissioner as such Appellate Court was a trial within such meaning. For it was, although a proceeding under s. 551 and therefore *ex parte*, of such a nature that judgment upon it against the appellant finally disposed of the case on the merits, the only other possible judgment being notice to the respondent to appear under s. 552 and following sections. Such a proceeding having such an effect must, in my judgment, be deemed a trial to all intents and purposes as intended by s. 21, and these questions being questions of law could legally be referred by the Chief Commissioner to the High Court.

Such is my answer to our colleagues of the Division Bench. But as I have made a careful examination of the record of the case, I trust they will allow me to point out to them certain irregularities of procedure on the part of the judicial authorities of Ajmere. The original suit appears to be of the nature described in s. 34 of the Ajmere Regulation, *viz.*, a suit in which a question of succession was clearly raised, and the Subordinate Judge gave his judgment on the 12th June 1877, dismissing the claim. From such judgment an appeal was taken to the Commissioner. The date of this appeal does not appear from the record, nor does the memorandum of appeal itself bear any date; the appeal nevertheless proceeded, and while it was pending, and before giving his judgment, the Commissioner referred to the Chief Commissioner a question of the nature mentioned in s. 17, which the Chief

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Commissioner answered, and thereupon the Commissioner disposed of the appeal before him according to the Chief Commissioner's opinion by a judgment dated the 26th February 1879, reversing that of the Subordinate Judge and dismissing the suit. The appellant in that appeal, considering that the Commissioner's decision so given was final for the purpose of s. 595, Civil Procedure Code, applied under ss. 598 and 600, Civil Procedure Code, to the Commissioner for a certificate that the case was a fit one for appeal to Her Majesty in Council. But the Commissioner did not consider his judgment final in that sense and refused the application, whereupon the appellant lodged a formal appeal in the Court of the Chief Commissioner against the judgment of the Commissioner. The Chief Commissioner ordered the case to be heard before him under s. 551, but while it was proceeding he was visited by the doubt to which I have referred. It is, however, to be observed that these proceedings took place without any apparent regard to the provisions of the Civil Procedure Code, the record showing no order to admit it or directing it to be placed on the register of appeals, and it might therefore be doubted whether in strictness there was any appeal at all before the Chief Commissioner. It might at least be very fairly contended that the record did not show any appeal to the Chief Commissioner which could go direct to the Privy Council from his Court.

PEARSON, J.—The point for consideration appears to be whether the doubt in respect of the question of law referred to the High Court by the Chief Commissioner was entertained by him in the trial of the appeal preferred to him by the plaintiff in the suit.

That an appeal had been formally lodged in his court is shown by the Chief Commissioner's statement. The counsel for the appellant informs us that he received a notice on behalf of his client to appear in the Chief Commissioner's Court on the 18th December last, and that when he appeared on that date the Chief Commissioner intimated that he was acting under the provisions of s. 551, Act X of 1877. The learned counsel further informs us that he then proceeded to address the Court, and was heard for some time and then stopped by the Court, in consequence of its

resolving to refer to the High Court the question of its competency to proceed with the appeal, or, in the form in which it is referred, the finality of the order appealed.

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Under the circumstances I am of opinion that the Chief Commissioner had commenced to hear and try the appeal, when the doubt which he desires the High Court to solve in respect of the question of law referred was entertained by him, and that the question was properly referred. The question whether an appeal can be heard is doubtless one which must be tried before the appeal can be tried on the merits, but the trial of that question is included in the trial of the appeal.

SPANKIE, J.—I am willing to acquiesce in the opinions of my honorable colleagues. At the same time I cannot help regarding the reference as made before the case came on for trial. The appeal appears to have never been formally admitted: there is no order upon the memorandum of appeal either admitting it or directing that it should be registered. There is no order upon it summoning the respondent or directing that the appellant should appear on a certain date under s. 551 of the Civil Procedure Code. I cannot realise that the Chief Commissioner was acting under s. 551 of the Civil Procedure Code, which applies to procedure in the Ajmere Courts, having been made applicable thereto by the Ajmere Code. The object of s. 551 is to hear appellant *without* summoning respondent, and if the Court thinks that there is no case, it *confirms* the decision of the Court below on the merits. I can understand the Chief Commissioner's entertaining a doubt whether he should not reject an appeal as being beyond his jurisdiction. But if he rejected it, he would not be confirming the decision of the Court below, for there would have been no trial in his Court. What has been done now is that the difficulty appears to have arisen before the case came to trial, and therefore the position is not the same as that in s. 17 of the Ajmere Code.

OLDFIELD, J.—The Court seems to have been proceeding with the trial when it made this reference on the question of its jurisdiction, and I see no reason for supposing that the reference was not properly made.

1880 STRAIGHT, J.—I think that this reference was properly made  
 THAKUR OF by the Chief Commissioner of Ajmere, and that it should be disposed  
 MASUDA of by this Court.  
 v.  
 THE The case having been again laid before the Division Bench  
 WIDOWS OF (SPANKIE, J., and STRAIGHT, J.) the following opinion was given  
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 THAKUR OF by the Division Bench :  
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STRAIGHT, J.—The Chief Commissioner appears to be right in his view, that the appeal of the Thakur of Masuda lies to Her Majesty in Council from the Commissioner's Court in this particular case.

## APPELLATE CIVIL.

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 April 5.

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

LACHMIN NARAIN (DEFENDANT) v. KOTESHAR NATH (PLAINTIFF).\*

*Mortgage—Condition against alienation—Lis pendens.*

The proprietor of certain immovable property mortgaged it in July 1876 to *K* and in September 1876 to *L*. In October 1878 he sold the property to *K*. In November 1878 *L* obtained a decree on his mortgage-bond for the sale of the property. The suit in which *L* obtained this decree was pending when the property was sold to *K*. *K* sued *L* to have the property declared exempt from liability to sale in the execution of *L*'s decree on the ground that the mortgage to *L* was invalid, it having been made in breach of a condition contained in *K*'s mortgage-bond that the mortgagor would not alienate the property until the mortgage-debt had been paid.

*Held*, that the purchase by *K* of the equity of redemption did not extinguish his security, it being his intention to keep it alive, and that the purchase of the property by *K* while *L*'s suit was pending did not prevent *K* from contesting the validity of *L*'s mortgage, so far as it affected him, on the ground that it was an infringement of the stipulation in the contract between him and the mortgagor.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

\* Second Appeal, No. 1126 of 1879, from a decree of R. G. Currie, Esq., Judge of Gorakhpur, dated the 25th July 1879, affirming a decree of Maulvi Nazar Ali, Munsif of Bansi, dated the 6th June, 1879.

Munshi *Kashi Prasad* and *Lala Lalia Prasad*, for the respondent.

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The following judgments were delivered by the Court :

OLDFIELD, J.—The plaintiff held a mortgage of the property in suit under a deed dated 9th July 1875, whereby the obligor stipulated that he would not make any mortgage of the property till the plaintiff's debt was satisfied, and on the 10th October 1878 the property was conveyed to plaintiff under a deed of sale in consideration of the debt secured by the mortgage. The defendant obtained a mortgage of the same property under a deed dated the 5th September 1875 from the obligor, notwithstanding the stipulation made to plaintiff, and having brought a suit on his bond he obtained a decree on 9th November 1878, this suit being still pending when the sale-deed was executed in favour of plaintiff. The object of the suit now brought by the plaintiff is to have the property declared exempt from liability to be sold in execution of the defendant's decree. The lower Courts have decreed the claim and the decrees are not open to objections.

There is no doubt that the defendant's rights cannot be affected by the purchase made by plaintiff, since it was made while the suit brought by the defendant was pending, but neither will that purchase deprive the plaintiff of any right he may otherwise have against the defendant based on his prior mortgage and the condition in his bond against subsequent mortgages by his obligor. The purchase of the equity of redemption does not necessarily extinguish the original security when, as in this case, it was manifestly the intention of the plaintiff to keep it alive,—Story's Equity Jurisprudence, 11th ed., vol. ii, s. 1035 c.—and there is nothing to prevent plaintiff from contesting the validity of the mortgage made to defendant so far as it affects him, on the ground that it is an infringement of the stipulation in the contract between him and his obligor. The appeal fails and is dismissed with costs.

SPANKIE, J.—I concur with my honorable colleague in his view of the case.

*Appeal dismissed.*

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April 6.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

**RAM NARAIN SINGH (DEFENDANT) v. MAHTAB BIBI (PLAINTIFF).\***

*Sale in execution of decree—Warranty—Caveat Emptor.*

In a sale in the execution of a decree of the rights and interests of a judgment-debtor in an estate of which he is the recorded proprietor in the revenue registers, it is usual to describe such rights and interests in the sale-proceedings as recorded in such registers, but such description does not amount on the part of the decree-holder or the officer conducting the sale to a warranty that such rights and interests are correctly described.

Where, therefore, according to the usual practice, the rights and interests of a judgment-debtor in a share of a village of which he was the recorded proprietor in the revenue registers were proclaimed for sale in the execution of a decree and sold, described, as recorded, and the sons of the judgment-debtor subsequently sued the auction-purchaser to recover their interests in such share and obtained a decree for such interests, and the auction-purchaser thereupon sued the decree-holder for a refund of the purchase-money proportionate to such interests and for the costs of defending such suit, *held* there being no fraud or misrepresentation on the part of the decree-holder, or any thing of an exceptional nature showing an express or implied warranty on his part, that the suit was not maintainable. *Neelkunt Sahoe v. Asmes Mathoo* (1) distinguished.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Colvin and Pandits Bishambhar Nath and Nand Lal, for the appellant.

Mr. Conlan, Mir Akbar Husain, and Shah Asad Ali, for the respondent.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The two defendants in this case have instituted separate appeals which may be disposed of by one judgment. The defendants held decrees of the Revenue Court against Khair-un-nisa Bibi, and in course of execution of these decrees a share in mauza Dohowa, described as 11 annas, 5 kants, 3 jaus, was attached, and the rights of the judgment-debtor were sold and bought by the plaintiff in this suit. Subsequently the sons of the judgment-debtor brought a suit for the declaration of their right and possession in a portion of the said share and obtained a decree, and the

\* First Appeal, No. 89 of 1879, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Asamgarh, dated the 26th June 1879.

(1) H. C. R., N.-W. P., 1871, p. 67.

plaintiff, auction-purchaser, has brought this suit against the two appellants to obtain a refund of the sale-price proportionate to the interest which she had to give up and for the costs incurred by her in defending the suit. Amongst the pleas urged in answer to the suit, those material to the disposal of the appeals before us were that the plaintiff purchased the rights and interests of the judgment-debtor without any guarantee on the part of the decree-holders of their extent, and being a sister-in-law of the judgment-debtor and mother-in-law of one of those who succeeded in the suit for the recovery of a share, she bought with a full knowledge of the extent of the judgment-debtor's interest. The Subordinate Judge has held that there was a guarantee that the entire 11 annas 5 kants 3 jans belonged to the judgment-debtor, and he has decreed the greater portion of the claim.

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We are of opinion that the grounds of appeal, so far as they take up the objections which we have above noticed, are valid. In judicial sales in execution of decrees of Court there is ordinarily no warranty of the title of the judgment-debtor in the property sold, on the part of the decree-holder or officer conducting the sale. In sales of rights and interests in immoveable property, the extent and nature of the interest of the judgment-debtor as described in the revenue registers, are notified at the time of sale under the rules in force, but the description so given is not intended by the decree-holder or the officer conducting the sale or taken by the purchasers at those sales to convey any warranty of the correctness of the description of the judgment-debtor's interest given in the revenue registers, or any warranty of the extent and nature of those interests. The subject of sale is nothing more than the right, title, and interest of the judgment-debtor described in the revenue register to be of a particular extent and character. Such will be the rule if the usual and ordinary practice be observed in the publication and conduct of these sales; and in the case before us nothing of an exceptional nature has been brought to our notice to show that there was any express or implied guarantee on the part of the decree-holders, nor are the facts such as will support any imputation of fraud or misrepresentation against the decree-holders. The application for sale is in the usual form for the sale

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of the rights and interests of the judgment-debtor, and the proceeding of the Collector, dated 22nd February 1875, at the close of the sale, shows very distinctly that the rights and interests of the judgment-debtor, whatever they might be, in the 11 annas 5 kants 3 jaus entered in the statement, were sold, and refute any supposition of express or implied warranty.

The plaintiff's case seems to rest on proceedings not so much with reference to the sale of the share in Dohowa, the subject of this suit, as to proceedings connected with the sale of the same judgment-debtor's interests in another mauza, *i.e.*, mauza Pakri. It appears that the sons of the judgment-debtor also claimed an interest in the share in mauza Pakri entered as that of the judgment-debtor and brought a suit, and that the defendants then denied that they had any interest, and asserted the share belonged to the judgment-debtor, and their suit was dismissed by the Court of first instance, though ultimately decreed in appeal, and it was before the decision of the appeal that the sale with which we are concerned took place. But those proceedings show nothing more than that the defendants, the decree-holders, *bond fide* contested the claim set up, which they were quite at liberty to do, and not that they induced the auction-purchaser in the case before us by fraud or otherwise to believe that the judgment-debtor had an interest which they knew she had not, or guaranteed that she had any particular interest. Moreover, looking to the relationship between the plaintiff and the judgment-debtor and the circumstances under which the sale took place, there is every reason to believe that the plaintiff was aware at the time of her purchase of the true character and extent of the judgment-debtor's interests which were put up for sale. The case of *Neelkunt Sahae v. Asmun Mathoo* (1) was brought to our notice by the counsel for respondent, but that case is to be distinguished from the one before us. There the decree under which a judgment-debtor's rights and interests had been sold and the sale so far as affected him were set aside and the property recovered by the judgment-debtor. We decree the appeal and reverse the decree of the lower Court and dismiss the suit with all costs.

*Appeal allowed.*

(1) H. C. R., N.-W. P., 1871, p. 67.

*Before Mr. Justice Spankie and Mr. Justice Straight.*

1880  
April 6.

WILAYAT HUSAIN (PLAINTIFF) v. ALLAH RAKHI (DEFENDANT).\*

*Muhammadian Law—Dower—Restitution of conjugal rights.*

A Muhammadan cannot, according to Muhammadan law, maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by cohabitation for five years, where the wife's dower is "prompt" and has not been paid. *Abdool Shukkoar v. Raheem oon-nissa* (1) followed.

THIS was a suit by a Muhammadan (Shia) against his wife for restitution of conjugal rights. The parties were married to each other in January 1873, and cohabited until September 1878, when the defendant separated from the plaintiff. The defendant set up as a defence to the suit, *inter alia*, that the plaintiff had settled a "prompt" or "exigible" dower on her of Rs. 5,000; that he had not paid the dower-debt; and that, until he paid the same, he was not entitled, according to Muhammadan law, to restitution of conjugal rights. The Court of first instance decided that the defendant's dower was "prompt;" that it amounted to Rs. 1,000; and that the plaintiff had paid the dower-debt in June 1877 by conveying certain immoveable property to the defendant of equal value; and in the event gave the plaintiff a decree. On appeal by the defendant the lower appellate Court decided that the dower-debt was Rs. 5,000, and that the plaintiff had paid no portion of it, and, holding that, according to Muhammadan law, he was not entitled to restitution of conjugal rights until he had paid it, dismissed the suit.

The plaintiff appealed to the High Court.

Pandit *Ajudhia Nath*, for the appellant.

Pandit *Nand Lal*, for the respondent.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—The only ground of appeal seriously urged before us was, that the lower appellate Court had erred in holding that

\* Second Appeal, No. 1074 of 1879, from a decree of H. G. Keene, Esq., Judge of Meerut, dated the 16th August 1879, reversing a decree of Maulvi Azmat Ali Khan, Munsif of Bulandshahr, dated the 28th March 1879.

(1) H. C. R., N.-W. P., 174, p. 94.



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the plaintiff's suit failed by reason of his inability to prove payment of "exigible" dower. It was argued on his behalf that a wife cannot refuse herself to her husband after such consummation or complete retirement as was proved in the present case by the cohabitation of the parties from 1873 to 1878. This contention was supported by a quotation from Baillie's Digest, p. 125; but upon careful consideration of it and a judgment of this Court, which appears directly in point, *Abdool Shukkoar v. Raheem-on-nissa* (1), we are of opinion that the views propounded by Aboo Haneefa should be followed, and that a woman entitled to dower, that is "maujji" or "prompt" may, even after consummation or valid retirement, deny her husband access to her person or her society, if it remains unpaid. Dower it must be remembered is the woman's right, and she may decline him the use of her person in order to enforce the man's pecuniary obligation to her. Of course where the dower is "muwajji" or "deferred," other considerations arise, which it is unnecessary to discuss. It may be added that passages will be found favouring the opinion we have expressed in Macnaughten's Muhammadan Law, ed. of 1870, p. 281; Ballie's Imameea, p. 73 (the plaintiff being a *Shia*); and Grady's Manual of Muhammadan Law of Inheritance and Contract, p. 246.

The lower appellate Court has found that the amount of dower in the present case was Rs. 5,000, that it was prompt, and that the plaintiff has not been paid it. The respondent's plea was therefore established and the plaintiff's claim has been properly disallowed. The appeal is dismissed with costs.

*Appeal dismissed.*

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 April 6.

*Before Mr. Justice Oldfield and Mr. Justice Straight.*

RAM LAL (PLAINTIFF) v. HARRISON (DEFENDANT).\*

*Amendment of Plaintiff—Limitation—Act X of 1877 (Civil Procedure Code), s. 53—Act XV of 1877 (Limitation Act), s. 4—Mortgage—Oral Evidence—Documentary Evidence—Act I of 1872 (Evidence Act), ss. 92, 96.*

The plaint in a suit for money charged upon immoveable property which described such property as "the defendants' one-biswa five-biswansi share

\* Second Appeal, No 899 of 1879, from a decree of C. W. Moore, Esq., Judge of Aligarh, dated the 5th May 1879, modifying a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 13th February 1879.

(1) H. C. B., N.-W. P., 1874, p. 24.

within the jurisdiction of the Court," was presented on the 21st November 1878 within the period of limitation prescribed for such a suit by Act XV of 1877. It was subsequently returned for amendment, and, having been amended by the insertion of the words "in mauza S, pargana S," after the word "share" was presented again on the 8th January 1879 after such period. *Held* that the date of the amendment of the plaint did not affect the question of limitation for the institution of the suit, and the return of the plaint for amendment and its subsequent presentation and acceptance by the Court did not constitute a fresh institution of the suit.

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The obligors of a bond for the payment of money describing themselves as "sons of R, zamindar and pattidar, resident of mauza S" hypothecated as collateral security for such payment "their one-biswa five-biswansi share." *Held*, in a suit on the bond to enforce a charge on the one-biswa five-biswansi share of the obligors in mauza S, that, under *Proviso* 6, s. 92 and s. 95 of Act I of 1872, evidence might be given to show that the obligors hypothecated by the bond their share in mauza S.

THE plaintiffs in this suit claimed Rs. 1,039-10 on a bond dated the 23rd November 1866, praying, *inter alia*, that the property hypothecated in the bond might be brought to sale, in case the defendants did not satisfy the judgment-debt. The suit was instituted on the 21st November 1878, the heirs of the original obligors of the bond, and one Harrison, the representative of a subsequent mortgagee of the property alleged to have been hypothecated by the bond to the plaintiffs, being made defendants. In the bond the original obligors, describing themselves as "the sons of Risal Singh, caste Thakur Bunder, zamindar and pattidar, resident of mauza Sakhauli," agreed to repay the sum advanced to them by the obligees, Rs. 500, with interest at twelve annas per cent. per mensem, on demand, and as collateral security for such payment hypothecated "their one-biswa five-biswansi share." In the original plaint in the suit the plaintiffs described the property as 'the defendants' one-biswa five biswansi share within the jurisdiction of the Court.' On the 8th January 1879 the plaint having been returned for amendment, the amended plaint was filed. The amendment consisted of the insertion after the word "share" of the words "in mauza Sakhauli, pargana Sikandra Rao." The Court of first instance gave the plaintiffs a decree as claimed. On appeal by the defendant Harrison the lower appellate Court held, *inter alia*, that the claim to enforce a charge upon the one-biswa five-biswansi share in mauza Sakhauli must be taken to have been instituted on

1880 the date on which the plaint was amended, and, as limitation ran from the date of the bond, was barred by limitation.

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The plaintiffs appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

The Court (OLDFIELD, J., and STRAIGHT, J.) remanded the case to the lower appellate Court for the trial of the issues indicated in the order of remand, which was as follows :—

OLDFIELD, J.—The plaintiffs sue to recover money due on a bond by sale of a one-biswa five-biswansi share in mauza Sakhauli hypothecated in the bond. They made the obligors and T. B. Harrison defendants, the latter being the representative of a subsequent mortgagee, and who has objected to the sale of the mortgaged property. The first Court decreed the claim. The lower appellate Court has dismissed that part which seeks to make the property liable. The Judge holds that the period of limitation will run in this suit from the date of the bond, 23rd November 1866, and though the suit was instituted on the 21st November 1878 yet since the property mortgaged was not indicated by name in the original plaint, and not until 8th January 1879, when an amended plaint was filed to the effect that the property hypothecated and claimed is in mauza Sakhauli, therefore the suit, so far as it affects the property, must be held to have been instituted on the 8th January, or after the expiry of the term of limitation ; and the Court further holds that the deed does not distinctly show that the share of one biswa five biswansis hypothecated in the deed is a share to that amount in mauza Sakhauli ; and on the above grounds the Judge dismissed the suit.

We are of opinion that the decision cannot be maintained. The date of amendment of a plaint will not affect the question of limitation for the institution of a suit ; the limitation is determined with reference to the date of institution of a suit, and by s. 4 of the Limitation Act a suit is instituted in ordinary cases when the plaint is presented to the proper officer, and its return for amendment and subsequent presentation and acceptance by the Court will not

constitute a fresh institution of the suit.—(See cases referred to in note to s. 53, Broughton's Civil Procedure Code, Act X of 1877). It is true that when after the institution of the suit a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party, but this rule is inapplicable to the case before us, where the defendant Harrison had been made a party at the first institution of the suit. The principal ground, therefore, on which the Judge has dismissed the claim to bring the property to sale is invalid, and his remarks on the indistinctness of the deed as indicating that the share in mauza Sakhauli was mortgaged do not adequately dispose of the claim. It is for the Judge to determine whether as a matter of fact the parties to the deed did mortgage the share in Sakhauli by the bond, and evidence on the point may be adduced.—See *Proviso* 6, s. 92, and *Illustration* to s. 95, Evidence Act. The Judge must also decide the question (raised by one of the pleas taken by the respondent) whether, looking to the conduct of the plaintiffs at the time the second mortgage was made, they are debarred now from enforcing their prior lien.

We remand the case for trial of the issues indicated. On submission of the finding ten days will be allowed for filing objections.

*Cause remanded.*

## CRIMINAL JURISDICTION.

*Before Mr. Justice Straight.*

EMPRESS OF INDIA v. NAWAB AND ANOTHER.

*Security for Good Behaviour—Act X of 1872 (Criminal Procedure Code), s. 506.*

*Held* that s. 506 of Act X of 1872 solely relates to the calling upon persons of habitually dishonest lives, and in that sense "desperate and dangerous," to find security for good behaviour, as a protection to the public against a repetition of crimes by them in which the safety of property is menaced and not the security of the person alone is jeopardised.

Where, therefore, the evidence adduced before the Magistrate did not show that a person was "by habit a robber, house-breaker, or thief, or a receiver of stolen property, knowing the same to have been stolen," but showed only

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that he had been guilty of acts of violence, *held* that the Magistrate could not, under s. 506 of Act X. of 1872, order such person to furnish security.

Observations regarding the evidence on which the procedure of s. 506 should be enforced.

THIS was an application to the High Court to revise an order of Mr. F. W. Porter, Magistrate of the first class, dated the 7th February 1880. The petitioners, Nawab and Mukta, were charged before the Magistrate under s. 323 of the Penal Code with voluntarily causing hurt. The Magistrate found them not guilty and acquitted them, but at the same time, with reference to s. 506 of Act X of 1872, ordered that they should furnish two respectable and sufficient sureties for their good behaviour, in the sum of Rs. 500 each surety, for a period of three years, and that, if they did not comply with the order, they should (subject to the sanction of the Court of Session) be rigorously imprisoned for such period. The reasons which induced the Magistrate to pass this order appear from the following extract from his decision in the case: "I do not think, however, that these men should either of them be allowed to go at large without heavy security for their future good behaviour. The reluctance of the witnesses to say anything about them, and their evident terror at having to give evidence at all showed clearly what an evil influence these two prisoners have. They are notorious in the city for bullying and are the terror of all quiet citizens of Allahabad. Their previous convictions show clearly the course of life they have led. Mukta since 1867 and Nawab since 1872 have hardly ever either of them been out of jail except under security to keep the peace. Nawab was imprisoned in 1872 for hurt and criminal trespass: in 1873 he was bound over for one year to keep the peace. In 1876 he was a second time bound over to keep the peace for another year. Hardly had this expired when he was again imprisoned for rioting coupled with hurt, and he has not been released from jail above three or four months when he is again brought before the Criminal Courts. The same with Mukta. In 1867 he was imprisoned for two years for grievous hurt: in 1872 was fined for assault. Again in 1872 he was sentenced to two years' rigorous imprisonment for rioting coupled with grievous hurt. In 1873 he was required to find security to keep the peace for one year, and in 1876 was again im-

prisoned for two years for grievous hurt and at the expiry of that period had to find security to keep the peace for one year. This term had hardly expired when he was brought up in the present case. There is no doubt that these two men are a terror to the inhabitants and a pest to the city of Allahabad. Their former history as above detailed shows that they are men so dangerous that their release without security is not to be thought of, and also that the limited period of one year is insufficient to meet the requirements of the case."

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The nature of the grounds upon which the High Court was asked to revise the Magistrate's order appears in the judgment of the Court.

Mr. Colvin, for the petitioners.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown.

STRAIGHT, J.—In this case the applicants were charged under s. 323 of the Penal Code with voluntarily causing hurt. The Magistrate, upon a careful consideration of all the evidence, acquitted them, but being of opinion that they were persons of violent and dangerous character, under s. 506 of the Criminal Procedure Code, directed them each to furnish two sureties in the sum of Rs. 500 for their good behaviour for a period of three years, or in default to undergo rigorous imprisonment for a like term. I am of opinion that this order cannot be sustained. The Magistrate has misapprehended the terms of 506, which do not apply to a case like the present where the original charge was one of injury to the person. That section solely relates to the calling upon persons of habitually dishonest lives, and in that sense "desperate and dangerous," to find security for good behaviour, as a protection to the public against a repetition of crimes by them in which the safety of property is menaced and not the security of the person alone is jeopardised. It is not pretended that either of the applicants has been an habitual "robber, house-breaker or thief, or receiver of stolen property;" on the contrary, all the convictions standing against them are for acts of violence. Entertaining this view it does not appear to me necessary to discuss the sufficiency or

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insufficiency of any evidence before the Magistrate, though I would remark in passing, that the mere fact of a previous conviction or of previous convictions of offences involving dishonesty, is not sufficient to justify the putting in force the powers of s. 506, unless there is some additional evidence to show that the person complained against has done some act or resumed avocations that indicate upon his part an intention to return to his former course of life and to pursue a career of preying on the community. The greatest thief is entitled to a *locus penitentie*, when he has served out his punishment; it is only when he outrages that grace which is extended to him and thereby shows he is unreformed that the machinery of the Act should be brought into operation, in order to obtain a substantial guarantee for society that he will not commit further depredations upon it. The order of the Magistrate of the 7th February last must be quashed. But upon a consideration of all the circumstances of the case, I think it right to direct that this record be forwarded to the Magistrate of the district for his consideration, in order that he may, should it appear to him proper to do so, himself take steps under s. 491 of the Criminal Procedure Code to call upon the applicants to find sureties of the peace in such amount as to him may appear adequate.

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 April 14.

### APPELLATE CIVIL.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.*  
 GUMANI (PLAINTIFF) v. RAM PADARATH LAL AND OTHERS  
 (DEFENDANTS).\*

*Act X of 1877 (Civil Procedure Code), ss. 13, 43—Act XII of 1879, s. 7—Bond for the payment of money hypothecating property as collateral security for such payment—Omission of claim.*

The obligee of a bond for the payment of money, hypothecating immovable property as collateral security for such payment, sued for the moneys due on the bond, but omitted to claim the enforcement of his lien, and obtained a decree only for the payment of the amount of the bond-debt. He subsequently sued to enforce his lien. *Held* that, under s. 43 of Act X of 1877 as amended by s. 7 of Act XII of 1879, he could not be permitted to sue to enforce his lien.

THE defendant Ram Padarath Lal, on the 1st May, 1875, gave the plaintiff a bond for the payment of Rs. 130, in which he hypo-

\* Second Appeal, No. 1219 of 1879, from a decree of R. G. Currie, Esq., Judge of Gorakhpur, dated the 9th July 1879, affirming a decree of Maulvi Nazar Ali, Munsif of Bansi, dated the 7th May 1879.

thecated his four-pie share of a mauza called Khoria as collateral security for the payment of that amount and interest. On the 21st August, 1876, his four-pie share of mauza Khoria was put up for sale in execution of a money-decree which the other defendants had obtained against him on the 16th December, 1874, and was purchased by the other defendants. Subsequently the plaintiff sued the defendant Ram Padarath Lal on her bond, asking for a money-decree only, which she obtained on the 11th December, 1876. She now sued to recover the amount of this decree, Rs. 189-3-9, by the sale of the property hypothecated in the bond. Both the lower Courts held that the suit was barred by the provisions of s. 13 of Act X of 1877, the lower appellate Court further holding that it was also barred by the provisions of s. 43 of that Act.

On appeal by the plaintiff to the High Court it was contended that the suit was not barred by either of those sections.

Pandit *Ajudhia Nath* and *Lala Latta Prasad*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Munshi Sukh Ram*, for the respondents.

The judgment of the Court (STUART, C. J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—S. 43 of Act X 1877, as amended by Act XII of 1879, is more apposite to the present case than s. 13. An obligation and a collateral security for its performance constitute the cause of action, and a plaintiff cannot be permitted to sue first in respect of the money-debt due on a bond hypothecating property, and afterwards, in respect of the same cause of action, for enforcement of lien. The appeal is dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

ASHGAR ALI SHAH (PLAINTIFF) v. JHANDA MAL AND ANOTHER  
(DEFENDANTS).\*

*Determination of title or of proprietary right—Act XIX of 1873*

(*N.-W. P. Land Revenue Act*), ss. 113, 114—*Res judicata*.

In the case of an objection to a partition raising a question of title, it is only when the Collector or Assistant Collector records a proceeding declaring

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\* Second Appeal, No. 1213 of 1879, from a decree of R. M. King, Esq., Judge of Meerut, dated the 24th June, 1879, affirming a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 25th February, 1879.



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the rights of the parties, after an adjudication of the objection on its merits, that his order becomes an order under s. 113 of Act XIX of 1873, within the meaning of s. 114 of that Act.

Where, therefore, an Assistant Collector made an order disallowing an objection to a partition raising a question of title, on the ground that such question had been determined against the objector in a suit for profits between the parties, *held* that such order was not a decision of a Court of Civil Judicature, within the meaning of s. 114 of Act XIX of 1873, but that it could be contested by a suit in the Civil Court. *Rameshwar Rai v. Subhoo Rai* (1); *Bukhta v. Ganga* (2); and *Harsahai Mal v. Maharaj Singh* (3) distinguished.

THE facts of this case were as follows :—The defendants, Jhandu Mal and Diwan Singh, applied for the perfect partition of a specific quantity of land, being their share of a certain mahál. The plaintiff, Ashgar Ali, who was a co-sharer in the mahál, objected to the partition on the ground that the defendants were claiming a larger quantity of land than they were entitled to. The Assistant Collector, on the 25th April, 1878, disallowed the objection, and decided that the partition should be made, on the ground that it had already been decided in a suit for profits between the parties that the defendants were entitled to the quantity of land which they claimed. The material portion of the Assistant Collector's decision was as follows :—“The claimants for partition state that the objection raised has been formerly determined. I am of opinion that a finding has been made on a former occasion; because in the case of Jhandu Mal and Diwan Singh, plaintiffs, claimants for partition, against Akbar Ali Shah, guardian of Ashgar Ali Shah, involving a claim for Rs. 368, principal, and Rs. 34-5-0, interest on the arrears of profits for 1283 fasli, the objector's first objection was the same as the one taken in this case. There the amount of the plaintiffs' share has been held to be correct. The above is sufficient for the rejection of the objector's application and continuance of the partition proceedings.” The plaintiff did not appeal from this decision of the Assistant Collector, but on the 24th July, 1878, instituted the present suit for possession of the land which the defendants had obtained in excess of the quantity to which he had alleged in the partition proceedings that they were entitled to. Both the lower Courts held that they were not competent to try the suit, inas-

(1) H. C. R. N.-W. P., 1869, p. 35, 10th April. (2) H. C. R., N.-W. P., 1868, p. 161.

(3) I. L. R., 2 All., 294.

much as the matter in issue had been heard and finally decided by the Assistant Collector, under the provisions of s. 113 of Act XIX of 1873.

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On appeal by the plaintiff to the High Court it was contended on his behalf that the matter in dispute had not been decided by the Assistant Collector under the provisions of s. 113 of Act XIX of 1873, and the lower Courts were consequently competent to try the suit.

Munshi *Hanuman Prasad*, for the appellant.

Pandits *Bishambhar Nath* and *Nand Lal*, for the respondents.

The Court (PEARSON, J., and OLDFIELD, J.) delivered the following judgments :

OLDFIELD, J.—This is a suit for possession by establishment of right to a certain share of lands. In the course of proceedings for a partition in the Revenue Court under Act XIX of 1873 instituted on the application of defendant, the plaintiff objected to the extent of the share claimed by defendant and asserted his own right to the share he now claims. His objection was disallowed with reference to a decision in a suit for profits, which had been brought against the plaintiff as lambardar, which the Assistant Collector held to have finally determined the extent of the plaintiff's interest, and the Assistant Collector made an order for the partition to proceed. Both Courts have held that the order of the Assistant Collector in those proceedings is an order of the nature of a decision of a Court of Civil Judicature, under s. 114, Act XIX of 1873, which may be open to appeal, but cannot be contested in a regular suit, and this is the question before us in appeal.

Under the provisions of s. 114 it is only orders or decisions passed under s. 113 of the Act for declaring the rights of parties which are held to be decisions of Court of Civil Judicature and open to appeal to the District or High Court under the rules applicable to those Courts; and we have to see if the Assistant Collector passed any such order in the course of the partition proceedings. S. 113 is as follows:—"If the objection raises any question of title, or of proprietary right, which has not been already determined

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by a Court of competent jurisdiction, the Collector of the District or Assistant Collector may either decline to grant the application until the question in dispute has been determined by a competent Court, or he may proceed to inquire into the merits of the objection. In the latter case the Collector of the District or Assistant Collector, after making the necessary inquiry and taking such evidence as may be adduced, shall record a proceeding declaring the nature and extent of the interests of the party or parties applying for the partition, and any other party or parties who may be affected thereby;” and then follow directions as to the procedure to be observed. It will be seen that the provisions of this section are only to be applied in cases where there has been no decision on the question of title raised by a competent Court, and it is only in such cases that the provisions of the section could properly be put in force, and the section allows the Collector two courses, either to decline to grant the application until the question has been determined by a competent Court, or to proceed to inquire into the merits, and make necessary inquiry and take such evidence as may be adduced, and having done so to record a proceeding declaring the rights of the parties. What is contemplated is clearly an adjudication on the merits, and it is only when the Collector records a proceeding declaring the rights of the parties after such adjudication that his order will be an order passed under that section.

In the case before us the Assistant Collector held that there had been a decision by a competent Court on the question of title. This finding put it out of his power to proceed under the section, and as a matter of fact he did not proceed under the section, for he simply gave effect to the former decision and summarily rejected the plaintiff's objection and ordered the partition to proceed; there was no order for declaring rights of parties after adjudication on the merits such as the section contemplates. The Assistant Collector was in error in holding that the former decision was one of a competent Court determining the question of title, but this error on his part does not alter the character of the order which he passed. The cases noticed by the Judge,—*Rameshur Rai v. Subhoo Rai* (1),

(1) H. C. R., N., W. P., 1869, P. 35, 10th April.

*Bukhta v. Gunga* (1)—are to be distinguished from the one before us. They were cases under Act XIX of 1863, and there had been an adjudication apparently on the title, but the procedure observed had been irregular. A case was brought to our notice at the hearing—*Har Sahai Mal v. Maharaj Singh* (2)—that was also a case of partition made under Act XIX of 1863 and the same remarks apply to distinguish it from the case before us.

I would reverse the decree of the lower Courts and remand the case to the Court of first instance for trial on the merits. Costs to abide the result.

PEARSON, J.—I concur.

*Case remanded.*

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April 22.

## FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr.*

*Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

MOHAN LAL (PLAINTIFF) v. RAM DIAL AND ANOTHER (DEFENDANTS).\*

*Act X of 1877 (Civil Procedure Code), s. 13—Res judicata.*

*M* sued *R* in the Court of the Munsif for a bond, alleging that he had satisfied the bond-debt, and for a certain sum which he alleged had been paid by him to *R* in excess of the bond-debt. On the 24th November, 1875, the Munsif having taken an account and found that Rs. 188-7-4 of the bond-debt were still due, made a decree dismissing the suit. *R* appealed to the Subordinate Judge, who on the 16th September, 1876, finding that Rs. 520-2-2 of the bond-debt were still due, affirmed the Munsif's decree. *M* appealed to the High Court on the ground that an appeal by *R* did not lie to the Subordinate Judge, as *R* was not aggrieved by the Munsif's decree. The Division Bench before which the appeal came, on the 10th August, 1877, holding that *R* was not competent to appeal to the Subordinate Judge, set aside the proceedings of the Subordinate Judge. In deciding the case the Division Bench made certain observations to the effect that the account between the parties was not finally settled, but might be taken again in a fresh suit. In November, 1877, *M* instituted a fresh suit against *R* to recover the bond on payment of Rs. 188-7-4, the sum found by the Munsif in the former suit to be due by him to *R*. *Held*, on the question whether the finding of the Munsif in the former suit was final and conclusive between the parties

(1) H. C. R., N.-W. P., 1868, p. 161. (2) I. L. R., 2 All., 294.

\* Second Appeal, No. 1246 of 1878, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 27th August, 1878, affirming a decree of Munshi Bansi Dhar, Munsif of Mainpuri, dated the 28th March, 1878.

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or the account might be again taken, that that finding, being a finding on a matter directly and substantially in issue in the former suit which was heard and finally decided by the Munsif, was final and conclusive between the parties and the account could not be again taken.

*Held* also that the observation of the Division Bench in the former suit were mere "*obiter dicta*" which did not bind the Courts disposing of the fresh suit.

THIS was a reference to the Full Bench by a Division Bench (SPANKIE, J., and OLDFIELD, J.). The facts giving rise to the reference and the point of law referred appear from the order of reference which was as follows :

OLDFIELD, J.—The facts of this case are stated in our order of remand dated the 19th May, 1879. The plaintiff entrusted a sum of Rs. 5,000 to his agent, with the object of paying off some mortgages, under certain bonds due to the defendants, on property which plaintiff had purchased, and the agent was directed to effect mutation of names. The agent had an account taken with the defendants, and the result was that the mortgage-debts under two bonds were held to be satisfied by the payment of the above money, and those bonds were returned by defendants, and the property mortgaged restored, and mutation of names effected in plaintiff's favour, but a third bond for Rs. 850, dated 16th February, 1869, was retained by the defendants, a balance in their favour being found due. The plaintiff, being dissatisfied with his agent's acts and the account taken, instituted a suit in the Court of the Munsif of Mainpuri to recover the said bond as satisfied, and also a surplus sum of Rs. 20-15-7, including interest, which he alleged was due to him out of the sum of Rs. 5,000, which he had sent by his agent and which had been paid to defendants. The Munsif dismissed the suit on 24th November, 1875; he held, after going into the accounts on all the bonds and crediting plaintiff with the Rs. 5,000 which he had paid, that Rs. 188-7-4 were still due by the plaintiff to the defendants. The defendants appealed and the Subordinate Judge, on 16th September, 1876, while affirming the decree dismissing the suit, held that Rs. 520-2-2 were due by plaintiff to defendants. A special appeal was preferred to the High Court by the plaintiff who objected that the defendants could not appeal from the Munsif's decree to the Subordinate Judge. The High Court allowed this

objection and set aside the proceedings in the Subordinate Judge's Court ; they remark in thier judgment, which is dated the 10th August, 1877 : " Inasmuch as the suit was dismissed, the plaintiff now urges in special appeal that the defendants could not appeal ; they were not aggrieved by the decree, but by the Munsif's judgment on a particular issue collateral to the issue decided by the decree. We must allow the force of the objection. It is to be regretted that, if the parties are again obliged to come into Court, the account must be again taken, and the plaintiff's suit might and should have been so framed as to avoid this ; but as it was framed, the plaint merely claiming to get back the bond for Rs. 850, the Munsif properly passed a decree simply dismissing the suit, and it was not competent to the defendants to present an appeal from that decree,—*Pan Kooer v. Bhugwant Kooer* (1). We must set aside the proceedings in the Subordinate Judge's Court, but as the plea was not taken in that Court and the frame of the suit has led to the unsatisfactory result that the account has not been finally settled, we order each party to bear his own costs in the lower appellate Court and in this Court."

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The plaintiff has now instituted the present suit in the Court of the Munsif of Mainpuri for recovering the same deed, by payment of the sum which the Munsif, in the former suit, found to be still due by him. The Munsif dismissed the suit on the ground that he had no jurisdiction with reference to the value of the claim. On appeal to the Subordinate Judge, he disallowed this ground of dismissal, but dismissed the suit on another ground, namely, that the plaintiff was bound by the act of his agent, when he settled the accounts with the defendants. The plaintiff has preferred a second appeal before us, and considering that the Subordinate Judge had not properly tried the issues which he had laid down for trial, as to whether the agent acted within the scope of his authority and whether his acts were collusive, we remanded the case with directions that he should re-try those issues. The Subordinate Judge has now found that there was no clear authority given for adjusting the account of the mortgage-debt.

(1) H. C. R., N.-W. P., 1874, p. 19.

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We accept this finding and at the same time observe that, under any circumstances, the plaintiff would be at liberty to set aside the adjustment of the account, if he could show mistake or fraud. But another question is raised in the appellant's third ground of appeal, namely, that the Munsif in his judgment dated 24th November, 1875, has decided that a sum of Rs. 188-7-4 is due by plaintiff to defendants, after account was taken, on the several mortgage-bonds, and that this decision, which was not set aside when the decision of the Subordinate Judge in appeal from it was set aside by the High Court, by their judgment dated the 10th August, 1877, is final and conclusive on the matter between the parties, and the account cannot be re-opened, notwithstanding anything said to the contrary in the judgment of this Court dated the 10th August, 1877.

We think it desirable that this question be referred for the opinion of the Full Bench of the Court and we refer it accordingly.

Pandit *Ajudhia Nath* and *Nand Lal*, for the appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*) and *Munshi Hanuman Prasad*, for the respondents.

The following judgments were delivered by the Full Bench :

STUART, C. J.—On full consideration of this case and of the former appeal which was disposed of by Turner, J., and myself, I am not prepared to dissent from the conclusion arrived at by my colleagues. I am always unwilling to prevent the re-opening of an account where any material error can be shown, and I am not clear that s. 13 of the Procedure Code would bar such a proceeding in the present case, but the inconvenience of again opening up such an account as this would be so great and the result so uncertain (in no event, I believe, material) that I feel quite willing that the case should be decided according to the opinions recorded by the other members of the Court.

PEARSON, J.—The remark of the High Court Bench in the judgment of the 10th August, 1877, that “if the parties are again obliged to come into Court, the account must be again taken ”

must, in my opinion, be regarded as a mere *obiter dictum* which does not bind the Courts disposing of the present suit.

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I am further of opinion that the Munsif's finding in the former suit that Rs. 188-7-4 was due by the plaintiff to the defendants was a finding on a matter directly substantially in issue between the parties in that suit, and has become final. In that suit not only was the recovery of the bond claimed on the ground that the bond-debt had been discharged, but Rs. 20-15-7 were also claimed as having been over-paid, and, for the purpose of disposing of the latter claim, it was necessary to determine by taking accounts whether Rs. 20-15-7 as claimed were due to the plaintiff or whether on the contrary as pleaded by the defendants a larger sum was due to them.

SPANKIE, J.—I am disposed to hold that the account cannot now be re-opened. On looking into the former case it seems clear that the state of the account was really in issue. The plaintiff could not under any circumstances claim the return of the mortgage-bond, if there were still any sum due under it, and the defendants had contended that the entire sum had not been paid off. As this contention referred to the particular deed which the plaintiff sued to recover, the question whether the money had been paid or not had to be determined.

It is to be regretted perhaps that a remark in the judgment of this Court in the former case has induced the defendants to contend that the accounts are still open and can be gone into again. But the wording of s. 13 as amended is peremptory. I would, therefore, say that the account was settled by the Munsif's judgment of the 24th November, 1875, and cannot be re-opened.

OLDFIELD, J.—It appears clear to me that the decision of the Munsif dated 24th November, 1875, has never been set aside and that it has finally decided that a sum of Rs. 188-7-4 was due by plaintiff to defendants on the several mortgage-bonds, and I hold that the accounts cannot now be re-opened.

The plaintiff in the former suit averred that a debt due to defendants on those bonds had been satisfied ; and he sought to have



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one of those bonds returned to him and to recover a sum of Rs. 20-15-7, including interest, due to him after satisfaction of the debt due on the bonds. The defendant pleaded that a large sum of money was still due to him on the bonds. The question as to what was the unpaid balance was necessarily on these pleadings directly and substantially in issue between the parties, and the decision on it has become final and cannot be re-opened in a fresh suit.

I am altogether unable to agree in the remarks made by the learned Judges in their order dated 10th August, 1877, in second appeal in that case, that the accounts could be re-opened in a fresh suit; and obviously those remarks cannot amount to a judicial determination that the accounts might be re-opened, for that was a point which could only be determined judicially at the hearing of any fresh suit which might be brought and by the Court deciding such suit. Moreover, holding as the learned Judges did that no appeal lay from the Munsif's judgment, they were powerless to make any decision on the merits of the case.

STRAIGHT, J.—I am of opinion that the objection raised by the plaintiff-appellant in his third ground of appeal should prevail, and that the finding of the Munsif of the 24th November, 1875, is a bar to the defendants re-opening the accounts between themselves and the plaintiff. The claim of the plaintiff in his original suit was to recover the bond for Rs. 850, and to recover the Rs. 20-15-7 which he alleged had been improperly paid by his agent in excess of the amount due from him to the defendants for redemption of the bond. Two specific heads of claim were therefore included in his plaint, both of which the defendants were called upon to answer or in default judgment must have passed against them. As to the Rs. 20-15-7, not only did they deny it was due, but they alleged a much larger amount was owing to them by the plaintiff. Here therefore was a matter alleged by the plaintiff and expressly denied by the defendants, in respect of which the relief asked by the plaintiff was refused him, and not only that, for the decree went on to state that Rs. 188-7-4 was due and owing from the plaintiff to the defendants. The judgment of the Munsif was final except in so far as he could have altered it on review, and equally so that of the lower appellate Court until it was disturbed by the

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decision of this Court, which had the effect of restoring the Munsif's findings and his determination of the whole case. The state of the litigation, then, was that the plaintiff's claim was dismissed, and he was decreed to owe the defendants Rs. 188-7-4. With great respect to the two learned Judges who decided the former appeal to this Court, it would appear as if they had entirely lost sight of the second head of the plaintiff's claim and the provisions contained in s. 216 of the Civil Procedure Code, so far as they affected the plea put forward by the defendants. Moreover, it appears to me that the terms of s. 43 of Act X of 1877 were imperative upon the plaintiff, in suing for the recovery of the bond, to claim the Rs. 20-15-7, for that was directly involved and had reference to the question whether the bond had or had not been satisfied. I take it to be a well-established principle that, unless there is any specific provision prohibiting a plaintiff from joining causes of action, he is bound to do so when they accrue at the same time and in respect of the same subject-matter. For a defendant is not to be subjected to the unnecessary expense and annoyance, either of defending or bringing a second suit, when all matters in difference between himself and a plaintiff can be disposed of in one. The state of the pleadings was such in the original suit between the now appellant and respondents, that the whole of the monetary dealings and accounts between them were opened up and evidence was taken and full consideration given to the proofs put forward on the one side and on the other. In the result the Munsif decreed Rs. 188-7-4 to be due and owing by the plaintiff to the defendants, and the latter appealed to the lower appellate Court, with the result that the full amount of their counter-claim was admitted by the Judge. It is beside the question now before me to criticise the decision of the learned Chief Justice and Turner, J., the effect of which was to leave the defendants entitled only to what the Munsif had decreed them. The plaintiff has accepted the Munsif's finding as binding on him, and has tendered the Rs. 188-7-4 to the defendants, who have refused to accept it. Hence the present suit. The remarks made by the two learned Judges in their judgment which are set out in the reference to the Full Bench are mere "*obiter dicta*," and can have no force or effect to alter the legal rights and disabilities of the parties.

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## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

TEJ SINGH (PLAINTIFF) v. GOBIND SINGH AND OTHERS (DEFENDANTS).\*

*Sale in Execution of decree—Pre-emption—Act X of 1877 (Civil Procedure Code),  
s. 310.*

A co-sharer in undivided immoveable property of which a share is sold in the execution of a decree does not, under s. 310 of Act X of 1877, acquire the right of pre-emption as against a stranger to whom such share has been knocked down, by merely asserting such right at the time of sale, and fulfilling the conditions of sale required by ss. 306 and 307 of that Act. He must bid at the sale and as high as the stranger before he can acquire a right of pre-emption under that section.

On the 21st January, 1878, two shares of an undivided share of a village called Jarara were put up to auction-sale in the execution of a decree, and were purchased by the defendants in this suit. At the time of sale the plaintiff in this suit, who was a co-sharer in such undivided share, asserted his right of pre-emption in respect of the property sold; and he, as well as the defendants, paid the deposit required by s. 306 of Act X of 1877, and the full amount of the purchase-money as required by s. 307 of that Act. The plaintiff did not bid at all for the property at the sale. The Court executing the decree rejected the plaintiff's claim to pre-emption and confirmed the sale in favor of the defendants. The plaintiff thereupon brought the present suit against the defendants to establish his right of pre-emption under s. 310 of Act X of 1877 in respect of the property. The Court of first instance gave him a decree. On appeal by the defendants, the lower appellate Court held that the suit was not maintainable and dismissed it, its reasons for so holding being as follows: "In the view of the appellate Court the meaning and substance of s. 310, Act X of 1877, are not those that the Court of first instance has described; on the contrary, the appellate Court is of opinion that the aim and substance of that section is merely this, *viz.*, that the share-holder ought also to bid at auction, and that, if the amount of the last bid by a stranger and the share-holder is the same, preference of purchase should be given to the

\* Second Appeal, No. 1142 of 1879, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 11th July, 1879, reversing a decree of Munshi Mata Prasad, Munsif of Akraabad, dated the 22nd April, 1879.

share-holder; that is to say, if the amounts bid by the stranger and the share-holder at auction be equal, it shall be knocked down to the share-holder. The rule as to the right of pre-emption in pattidari villages which was fixed under s. 14, Act XXIII of 1861, with a view to assimilating it to Act I of 1841, has been annulled by this section: and since it is admitted that the plaintiff made no bid at auction, the defendant alone having bid, and the officer conducting the sale knocked the same down to the bid of the latter, the plaintiff under such circumstances is in no way entitled to bring a suit in the Civil Court on the ground of pre-emptive right by virtue of his having filed an application for pre-emption before the officer conducting the sale on the date of the sale, and having paid earnest-money, and having paid the remainder of the purchase-money within the period of fifteen days, and for the Court to have made a decree for maintenance of pre-emptive right."

The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.,) was delivered by

PEARSON, J.—The construction put by the lower appellate Court on the terms of s. 310, Act X of 1877, appears to us to be correct. The appeal, therefore, fails and is dismissed with costs.

*Appeal dismissed.*

## FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

LACHMAN DAS (PLAINTIFF) v. DIP CHAND (DEPENDANT).\*

*Optional and compulsory registration—Act VIII of 1871 (Registration Act)—Act III of 1877 (Registration Act), s. 50—Act I of 1863 (General Clauses Act), s. 6—Registered and unregistered document.*

*Held*, in the case of a document executed while Act VIII of 1871 was in force, the registration of which under that Act was optional, and which was not registered

\* Second Appeal, No 402 of 1879, from a decree of H. G. Keene, Esq., Judge of Agra, dated the 10th January, 1879, modifying a decree of Maulvi Munir-ud-din, Munsif of Jalesar, dated the 22nd November, 1878.

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thereunder, and of a document executed after Act III of 1877 had come into force, the registration of which under that Act was compulsory, and which was registered thereunder, both documents relating to the same property, that under the provisions of s. 50 of Act III of 1877 the registered document took effect as regards such property against the unregistered document, the provisions of s. 6 of Act I of 1863 notwithstanding.

THE plaintiff in this suit claimed to recover Rs. 82-2-3 on two bonds dated respectively the 11th June, 1875, and the 24th July, 1876, by the sale of the property hypothecated in such bonds. The bond dated the 11th June, 1875, was for Rs. 25, payable on demand with interest at the rate of Rs. 2-8-0 per cent. per mensem. The bond dated the 24th July, 1876, was for Rs. 21, payable on demand with similar interest. Neither of the bonds were registered. The defendant Dip Chand, to whom the other defendants had transferred the property hypothecated in these bonds, under a deed of sale, dated the 13th July, 1878, contended that the deed of sale, being duly registered under Act III of 1877, took effect as regards the property in suit as against the unregistered bonds. The Court of first instance did not determine this contention, but gave the plaintiff a decree in respect of the property. The lower appellate Court allowed the contention, having regard to s. 50, Act III of 1877, and reversed the decree of the Court of first instance so far as it affected the property.

On appeal by the plaintiff to the High Court it was contended on his behalf that Act VIII of 1871, and not Act III of 1877, was applicable and, inasmuch as under the former Act the registration of the deed of sale was compulsory while the registration of the bonds was optional, the former instrument did not take effect as regards the property in suit as against the latter instruments. The Division Bench (Stuart, C. J., and Oldfield, J.,) before which the appeal came for hearing, having regard to the fact that there were conflicting rulings of the Calcutta and Allahabad High Courts,—*Oghra Singh v. Ablakhi Kooer* (1); S. A. 1196 of 1878, decided the 5th August, 1879, (2)—referred to the Full Bench the following question:—"Whether the provisions of s. 50, Act III of 1877, apply to give effect to the defendant's registered deed against

(1) 1. L. R., 4 Calc., 536. (2) Unreported.

plaintiff's deeds, so as to prevent the plaintiff enforcing his mortgage against the property bought by defendant."

Munshi *Hanuman Prasad*, for the appellant.

The respondent did not appear.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—There cannot be the least doubt or difficulty as to the meaning and application of s. 50, Act III of 1877, to such a case as the present. I have held that opinion ever since that Act came into operation, and I lately gave effect to it in a judgment on a Division Bench, not then anticipating the present reference. As to s. 6 of the General Clauses Act, it is idle to contend that it has any bearing whatever in such a case as this.

PEARSON, J.—S. 50, Act III of 1877, declares that registered documents relating to land of which registration is optional shall take effect against unregistered documents; and the word "unregistered" is defined in the explanation thereunder to mean, in cases where the document is executed after the first day of July, 1871, not registered under Act VIII of 1871 or the Act of 1877. That definition appears to me to preclude and negative the view that an unregistered document of 1876 could be protected by s. 6, Act I of 1868, from being affected by s. 50, Act III of 1877. Whether such a view could be maintained was stated to be the point for consideration.

SPANKIE, J.—In reply I would say that the provisions of s. 50, Act III of 1877, do apply to this case. I do not think that s. 6 of the General Clauses Act would apply to a case of this nature.

OLDFIELD, J.—The registration of the plaintiff's deeds is optional, and by s. 50 of Act VIII of 1871, which was in force at the time they were executed, they would take effect in preference to such a deed as that of the defendant though registered, since the registration of the latter is compulsory.

By the terms of s. 50, Act III of 1877, however, every registered document, whether its registration be compulsory or optional, shall take effect against every unregistered document relating to the same property, and hence the defendant's document executed since the Act came into force will now take effect in preference to the

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plaintiff's. The effect upon the plaintiff's is of course that a document, which was perfectly valid and effective at the time it was executed against any such registered document as that of defendant which might subsequently be executed, has now become ineffectual against such a document.

I was at first inclined to consider that the Legislature could not have intended such a result, particularly as no provision is made for enabling parties to register within a reasonable time those unregistered documents affected for the first time by the provisions of the new Act; and I was inclined to think that the right of persons circumstanced like the plaintiff might be saved by the provisions of s. 6, General Clauses Act, whereby the repeal of any Statute, Act, or Regulation shall not affect anything done before the repealing Act shall have come into operation. But a careful examination of s. 50 and the explanation annexed to it has satisfied me that the application of s. 6 of the General Clauses Act will not save plaintiff's document from being affected by the provisions of s. 50, for Act III of 1877 does more than merely repeal Act VIII of 1871. It contains in s. 50 an express provision by which all unregistered documents executed at the time the former laws referred to in the section were in force are to be defeated by all registered documents of the nature of those mentioned in the section. I would, therefore, answer the reference in the affirmative.

STRAIGHT, J.—It appears to me that s. 50 of the Registration Act of 1877 is conclusive, and that the defendant's registered deed takes precedence of the plaintiff's unregistered bonds.

## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

GHULAM MUSTAFA (PLAINTIFF) v. HURMAT AND ANOTHER (DEPENDANTS).\*

*Muhammadan Law—Gift—Dower.*

*Held* that the provisions of the Muhammadan law applicable to gifts made by persons labouring under a fatal disease do not apply to a so-called gift made in lieu of a dower-debt, which is really of the nature of a sale.

\* Second Appeal, No. 1286 of 1879, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 14th August, 1879, affirming a decree of Shah Ahmad-ullah, Munsif of Bareilly, dated the 30th May, 1879.

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April 27.

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THE plaintiff in this suit claimed under a deed of sale possession of a five-biswansi share of a village called Benipur, on payment of Rs. 52-8-0, being the dower-debt due to the defendant Hurmat by her deceased husband, Nur Muhammad. The property in suit was a portion of a ten-biswas share of Benipur which had belonged to Nur Muhammad, who died on the 25th August, 1875. On the 21st August, 1875, or four days before his death, Nur Muhammad executed a deed of gift transferring his ten-biswas share of Benipur to the defendant Hurmat. The consideration for this transfer purported to be Rs. 1,600, being part of a sum of Rs. 2,500 which was alleged to be due by him to his wife on account of dower. Under this transfer the defendant Hurmat obtained possession of the share. On the 11th February, 1879, the defendant Ali Ahmad, asserting himself to be the owner of seven biswas and a half out of the ten biswas share, by inheritance from Nur Muhammad, executed the deed of sale in favour of the plaintiff under which he claimed, transferring five biswansis of the property to him. The plaintiff contended that the deed of gift executed by Nur Muhammad in favour of the defendant Hurmat was invalid, since it had been executed when Nur Muhammad was suffering from a fatal disease, and consequently, according to Muhammadan law, when he was incapable of transferring his property. Both the lower Courts found as a fact that the deed of gift was executed by Nur Muhammad while in full possession of his senses, and held that the Muhammadan law applicable to gifts made by a person labouring under a fatal disease did not apply to a gift made in consideration of a dower-debt.

On appeal to the High Court the plaintiff again contended that the gift to the defendant Hurmat was invalid according to Muhammadan law, having been made while the donor was suffering from a fatal disease.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

Mr. *Conlan* and Mir *Zakur Husain*, for the respondents.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

PEARSON, J.—The provisions of the Muhammadan law applicable to gifts made by persons labouring under a fatal disease do not



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apply to a so-called gift made in lieu of a dower-debt, which is really of the nature of a sale. Case No. 21 in Macnaughten's Precedents of marriage, dower, divorce, and parentage is on all fours with the present case and entirely supports the decision of the lower Courts. The just claims of the heirs are not interfered with by the payment of debts which must be paid before the heirs can enter upon the inheritance. The lower Courts have found on the evidence that the executant of the deed in question in the present case was in his sound senses when he executed the deed; and from the medical evidence it is doubtful whether he was then labouring under the disease which caused his death shortly afterwards. The appeal fails and is dismissed with costs.

*Appeal dismissed.*

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April 28.

*Before Mr Justice Pearson and Mr. Justice Straight.*

**BHAGWAN PRASAD (JUDGMENT-DEBTOR) v. SHEO SAHAI (DECREE-HOLDER)\***

*Execution of decrees—Act X of 1877 (Civil Procedure Code), s. 326.*

S. 326 of Act X of 1877 does not apply to a decree which directs the sale of land or of a share in land in pursuance of a contract specifically affecting the same. The Court, therefore, cannot authorize the Collector to stay the sale in such a case under s. 326.

THE decree in this case, bearing date the 16th August, 1878, had been made in a suit on a bond for the payment of certain money charging certain land paying revenue to Government with such payment. Among the reliefs asked for in the suit was the sale of such land for the satisfaction of the bond-debt. The decree directed, *inter alia*, the sale of such property in satisfaction of such debt. The property having been attached in the execution of the decree, the Collector, with reference to s. 326, Act X of 1877, represented to the Subordinate Judge, the Court executing the decree, by a proceeding dated the 17th December, 1878, that the sale of the land was objectionable, and that the decree might be satisfied by instalments within eight years by a lease of the land for that term; and asked the Subordinate Judge to postpone the sale of the land which was fixed to take place on the 20th December, and to authorize him

\* Second Appeal, No. 25 of 1880, from an order of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 19th January, 1880, reversing an order of Babu Ram Kali Chaudhri, Subordinate Judge, dated the 11th March, 1879.

to provide for the satisfaction of the decree in the manner recommended by him. The Subordinate Judge accordingly postponed the sale, and on the 11th March, 1879, made an order sanctioning the Collector's recommendation. On appeal by the decree-holder from this order, the District Judge set it aside, having regard to the case of *Womda Khanum v. Rajroop Koer* (1).

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The judgment-debtor appealed to the High Court, contending that there was nothing in s. 326 of Act X of 1877 confining its provisions to money-decrees.

Munshis *Hanuman Prasad* and *Ram Prasad*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.,) was delivered by

PEARSON, J.—Reading s. 326 with s. 322 of the Code, we are of opinion that the lower appellate Court's order, referring to a decree which directs the sale of immoveable property in pursuance of a contract specifically affecting the same, is right; and we therefore dismiss the appeal with costs.

*Appeal dismissed.*

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*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.*

MUMFORD (PLAINTIFF) v PEAL AND ANOTHER (DEFENDANTS).\*

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1880  
April 29.

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*Bond—Waiver—Act IX of 1871 (Limitation Act), sch. ii, art. 75—Cause of Action.*

The mere acceptance by the obligee of a bond payable by instalments, which provides that in case of failure to pay one or more instalments the whole amount of the bond due shall become payable, of instalments after default does not constitute a "waiver," within the meaning of art 75, sch. ii, of Act IX of 1871, of the obligee's right to enforce such provision.

In the case of such a bond the cause of action arises on the first default, and limitation runs from the date of such default.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

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(1) I. L. R., 3 Calc., 335.

\* Second Appeal, No. 912 of 1879, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 18th April, 1879, affirming a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 2nd September, 1878.

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Mr. *Colvin* and the *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for the appellant.

Messrs. *Hill* and *Howard*, for the respondents.

The following judgments were delivered by the Court:—

STRAIGHT, J.—This is a suit brought by the plaintiff to recover from the defendants the sum of Rs. 3,917-8-6, being the amount of principal and interest due upon a bond bearing date the 27th September, 1871, and executed by one James Giddens, deceased, of whom defendant No. 1 is the widow, by Robert Peal, defendant No. 2, and by one George Richards, who has not been included in the proceedings. The plaintiff also seeks to realize the amount of his claim by sale of a certain bungalow, hypothecated by the before-mentioned James Giddens as security for the above sum of Rs. 3,917-8-6, and the cause of action is alleged to have accrued on the 27th September, 1874, the date before which the amount covered by the bond was agreed to be repaid.

Defendant No. 1 in reply states that the plaintiff voluntarily undertook to discharge the amount of the said bond, of which the Uncovenanted Service Bank was the obligee, and that as security for doing so he had possession given him of the hypothecated bungalow and received the rents therefrom for a long period of time; that he promised not to charge interest for any payments made by him to the Bank; and that she is willing the bungalow should be sold to satisfy the principal debt due to the plaintiff, but not to pay any interest, which he had promised not to demand. Defendant No. 2 pleads that, as he was no party to the deed by which the plaintiff became assignee of the bond of the 27th September, 1871, and had no notice of the assignment, he is not liable to plaintiff, and that the bond was not assignable by law; that upon the death of the obligor James Giddens he wrote to the manager of the Bank, requiring him, in consequence of defaults that had been made in the payment of instalments, to enforce hypothecation by sale of the mortgaged bungalow, but that the Bank failed to do what he requested, and he (the defendant No. 2) is accordingly freed from all liability; that he was only a surety for the obligor and not a co-obligor; that the suit is

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barred by limitation, as any cause of action the plaintiff might have had arose on the 11th October, 1872, the date of the death of James Giddens, or on some prior day when the last payment in liquidation of the bond was made. The first Court, holding the plea of limitation to be fatal to the plaintiff's claim as against the persons of the two defendants, dismissed it to that extent, but gave him a decree against the property, and this decision was upheld by the lower appellate Court.

The plaintiff now appeals to this Court, and the only argument seriously urged before us was that, inasmuch as the obligee of the bond took no steps to sue on the default by the obligor to pay his instalments, and accepted payments after default made, he must be taken to have waived the breach of the contract that had then been made.

The case is one of some complication, and in order satisfactorily to consider it, it is necessary to detail the following facts. One James Giddens, a Government employé and resident of Allahabad, in the year 1871 seems to have been in pecuniary difficulties, and in order to tide over them he had recourse for assistance to the Uncovenanted Service Bank, of which a Mr. Fairlie was the Agent and Manager. He ultimately effected a loan of Rs. 3,350, and the transaction was completed on the 27th September, 1871, by the execution of a joint and several bond for that amount by himself, his brother-in-law by marriage, Mr. Robert Peal, and one George Richards. in which it was agreed that the Rs. 3,350 should be repaid by regular monthly instalments of Rs. 80 each, together with interest "at 12 per cent. payable monthly by deduction from each remittance or payment or otherwise added to the principal at the end of each half year, namely, on the 30th June and the 31st December." The first instalment was to become payable on the 10th November, 1871, and it was further provided, "that in the event of failure in the payment of any one or more instalments, and whether advice be or be not given of such default, we hereby jointly and severally render ourselves liable to pay up the full amount or such balance thereof as may become due according to the account current of the said Bank, with all interest and other charges that may or shall be incurred on account of the said loan."

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Concurrently with the execution of this bond James Giddens by deed mortgaged a bungalow in Allahabad to the Bank, and gave authority therein to the Bank to sell the same to the best advantage either publicly or privately, "should the loan of Rs. 3,350 be not liquidated with all other charges within the time and in the manner agreed upon in the bond, or in case of my death in the interim before the discharge of the said debt."

It is an admitted fact in the case that the Rs. 3,350 were paid to James Giddens, and that he alone had the benefit and the use of the money. The instalments, it will be observed, had to be paid on the 10th of each month, and those for November and December, 1871, were punctually discharged. But this regularity was not continued with those that followed, the payments being made on the following dates :—

				Rs.
January	10th,	1872	...	50
"	17th	"	...	30
February	12th	"	...	80
March	8th	"	...	80
May	8th	"	...	80
August	3rd	"	...	40
				—
or in all				360
				—

On the 11th October, 1872, James Giddens died, and at that time there were five monthly instalments due—that is Rs. 400, and this independent of interest, in respect of which nothing had been paid. Soon after Giddens' death Mr Fairlie wrote to Mr. Richards and Mr. Peal, inquiring of them what arrangements they proposed to make to liquidate the unpaid balance owing on the bond, and on the 14th November, 1872, the latter replied as follows:—"As you hold a collateral security in the mortgage of Mr. Giddens' house, and as this mortgage was executed with the object of securing his securities from becoming liable, or at least incurring any loss in the event of any contingency preventing Mr. Giddens liquidating the debt, I request you will foreclose the mortgage and pay off the Bank's debt. The widow of Mr. Giddens wrote to me

the other day stating that she had called on you with the object of requesting you to take possession of the house and with it pay off the Bank's claim, but that you were out. I shall feel obliged if you will communicate with her and let me know the result." Upon receipt of this letter Mr. Fairlie does appear to have threatened to put the powers of the Bank under the mortgage into force, and thereupon the plaintiff, Mumford, a step-brother of the deceased James Giddens, at the earnest solicitations of his widowed sister-in-law, first introduced himself into the matter by paying on the 19th December, 1872, the sum of Rs. 450 to the Bank on account of the bond. In passing it may be remarked that at that date seven instalments, or in other words Rs. 560, was the amount actually due. Mumford afterwards made the following further payments :—

		Rs.
January 20th, 1873	...	225
February 20th ,,	...	225
March 20th ,,	...	225
		<hr/>
		675

From this latter date to the 26th January, 1874, the principal and interest were allowed to accumulate till they reached Rs. 2,540, which sum on the 26th January, 1874, was liquidated in full by Mumford, who thus out of the Rs. 4,185 actually received by the Bank in respect of the bond had found no less than Rs. 3,665. On the 18th February, 1874, Mr. Fairlie on behalf of the Bank, whose claim had been satisfied, assigned to Mumford by deed all its rights, interests, and powers in the bond of the 27th September, 1871, and the collateral mortgage of the same date. About this time an account was opened in the books of the Bank headed "James Giddens, Esq., in loan account with E. A. Mumford, Esq.," the first item of which on the debit side was as follows:— "27th January, 1874.—To amount paid to the Uncovenanted Service Bank, Rs. 3,653-4-0." It is clear that Mumford had then been put in possession of the hypothecated bungalow by defendant No. 1, and indeed the facts establish it beyond question, for on the credit side of the same account will be found a succession of

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entries down to October 2nd, 1874, recording the receipt of the rent of it, apparently by Mumford direct, and after that date until the 12th August, 1875, through defendant No. 1. The total of the former is Rs. 410 and of the latter Rs. 750, or Rs. 1,116 in all. The balance appearing as due for the principal debt on the 12th August, 1875, was Rs. 3,145-8-6 and for interest Rs. 772, making a total of Rs. 3,917-8-6, for recovery of which sum the plaintiff instituted his present suit on the 17th September, 1877.

It has been necessary to go at this length into the facts in order to make the point taken in appeal intelligible. The case was most ably and exhaustively argued before the learned Chief Justice and myself on three different occasions, and we took time to consider our judgment, in order to examine the numerous authorities quoted on either side. The simple and sole point for our consideration is whether the Uncovenanted Service Bank, the obligee of the bond of the 27th September, 1871, by accepting payments after default had been made in the instalments, waived the benefit of its provisions, within the meaning of art. 75, sch. ii, Act IX of 1871.

It does not appear to me that any question properly arises as to the competency of the plaintiff to bring this suit, or as to the primary liability of defendant No. 2 under the bond. I see no reason to hold that the assignment of the Bank by the deed of 18th February, 1874, was otherwise then legal, and the plaintiff stands in no better or worse position than his assignor. The terms of the bond preclude the contention that defendant No. 2 was only a surety, and it is clear that he made himself jointly and severally liable as an obligor with the other two persons executing it. It is much to be desired that the bond were equally plain and explicit in other respects. Its terms as to mode of payment are so singularly contradictory that if strictly interpreted they could not have been carried out. For it was absolutely impossible to discharge a sum of Rs. 3,350 within three years from the 27th September, 1871, by monthly instalments of Rs. 80, the first of them commencing on the 10th November, 1871. To the 27th September, 1874, by which date the bond was redeemable, would be exactly 35 months, which multiplied by 80 gives Rs. 2,800, or Rs. 550 short of the principal sum covered by it, to say nothing

of interest. The contracting parties are not to be congratulated on their arithmetic, and by their carelessness they have raised a difficulty which with ordinary circumspection might have been avoided. It seems to me, however, that the bond must be regarded as one payable by instalments, on default in payment of one or more of which the whole principal amount then due could at once be demanded. To this extent its language is certain and precise, and I do not know that, for the purpose of disposing of this appeal, we are called upon to determine what the intentions of the parties were, as to when and how the balance over and above the 35 instalments should be discharged, though that it was, in some way and at some time, within the three years, to be forthcoming seems plain. Then comes the question whether default was made in the instalments, and if so, whether the conduct of the Uncovenanted Service Bank in accepting subsequent payments amounts in law to a waiver.

Both the lower Courts have in substance answered the first of these propositions in the affirmative and the latter in the negative. The ground upon which we are invited to disagree with their decisions is, that the finding on the latter point is in the teeth of the evidence, and that the mere fact of money having been received on account of the bond by the Bank is sufficient of itself to constitute a legal waiver. I cannot for a moment accede to this view. On the contrary, I think that the most cogent and conclusive proof must be demanded to establish that a party to a contract has abandoned a right accruing to him under its provisions on breach, and has entered into some fresh parol arrangement condoning such breach and creating new relations with the party in default. "A waiver must be an intentional act with knowledge, and it is incumbent on any party insisting on a verbal agreement in substitution of a written contract to show that both parties understood the terms of the substituted agreement."—*The Earl of Darnley v. The London, Chatham and Dover Railway Co.* (1). In the present case the first default occurred on the 10th January, 1872, when only Rs. 50 instead of Rs. 80, the proper instalment, was forthcoming; and though it is true that the remaining Rs. 30 were paid on the 17th of that

(1) L. J., 36 Eq., 404.

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month, the fact is not altered that a cause of action had accrued to the Bank under the terms of the bond. In February the payment was two days late; in March two days before time. In April, however, nothing was forthcoming, and it was not until the 8th May that another Rs. 80 found its way to the Bank. Then there was a further suspension during June and July, and finally, on the 3rd August there was a payment of Rs. 40, the last ever made by James Giddens prior to his death. At that date, irrespective of interest, only Rs. 520 had been paid as against Rs. 720 due, and consequently during the period between November, 1871 and July, 1872, no less than three instalments, or Rs. 240, had fallen into arrears. Even could we hold that the two payments in January, 1872, were so near to one another as not to constitute a default, it would be impossible to place a similar construction upon the absence of any payment in April, 1872. Looking at all these facts, I see nothing whatever to establish that the Bank entered into any arrangement or understanding to forego the cause of action that had arisen on the 10th January, 1872, or that any fresh parol agreement qualifying the provisions of the bond of 27th September, 1871, was ever made. But even were there evidence of this to bind Giddens and his representatives, it appears to me that an insurmountable obstacle lies in the plaintiff's way, in the circumstance that there is not a particle of proof that defendant No. 2 was ever a party to any such subsequent verbal contract. On the contrary, as far as there is material for forming an opinion, it would seem as if Mr. Peal was all along in ignorance that any default in the payment of instalments had been made, until he received the letter from Mr. Fairlie, shortly after Giddens' death, asking him what arrangement he proposed to make to liquidate the unpaid balance of the loan. It is not attempted to be set up by the plaintiff that as between Peal and the Bank there was any agreement or understanding come to in abrogation or substitution of the terms of the bond under which he had contracted, and the argument for appellant therefore really comes to this, that we are to hold defendant No. 2 bound by a parol arrangement of which he had no knowledge and to which he never gave his acquiescence. The plaintiff is on the horns of

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a dilemma, either the bond of September, 1871, was superseded and rescinded, or it was not. If it was, the defendant No. 2 was no party to its supercession and rescission; if it was not, the cause of action arose on the 10th January, 1872, and his claim is barred by limitation. To contend that the acceptance of subsequent payments by the Bank from the plaintiff has any binding effect upon defendant No. 2 proceeds upon an entire misconception of the principle on which the doctrine of waiver is based, nor is the fact itself worthy a moment's serious consideration in face of the demand made upon defendant No. 2 by the Bank, immediately after Giddens' death, for "*the unpaid balance of the loan*," a pretty strong indication that at that time its right to the whole principal sum covered by the bond was considered to have accrued. The plaintiff by his assignment of the 18th February, 1874, took the position theretofore occupied by his assignor with all the rights, interests, and disabilities pertaining thereto, and he had abundant time, between that date and the 10th January, 1875, when limitation finally barred him, even after the 27th September, 1874, the day before which the bond had to be satisfied, to take his claim into Court. Upon what principle the plaintiff alleged his cause of action to have accrued on the 27th September, 1874, is far from intelligible. The bond was, as has already been pointed out, payable by instalments, on default in one or more of which the whole amount became due and payable, and the law is perfectly clear upon the point, that the cause of action in such a case accrues on the first default, from the date of which limitation begins to run. Decisions without end to this effect may be found, but it is sufficient for me to refer to *Hemp v. Garland* (1); *Madho Singh v. Thakoor Pershad* (2); and *The Unco-venanted Service Bank v. Khetter Mohan Ghose* (3). It therefore appears to me that the cause of action, which accrued to the Bank and was passed on with the bond to the plaintiff by the assignment, arose on the 10th January, 1872, and that the present suit is barred by limitation. The plea of waiver entirely fails. I would accordingly dismiss this appeal and confirm the judgment of the Courts below with costs.

(1) 12 L. J., Q. B., 134; S. C. 4 Q. B., 519.

(2) H. C. R., N.-W. P., 1873, p. 35.

(3) H. C. R., N.-W. P., 1874, p. 88.

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STUART, C. J.—I am so entirely satisfied with the examination of this case, in fact and in law, afforded by the judgment of my colleague Mr. Justice Straight, that I feel I need add nothing to what he has so clearly and satisfactorily stated. The case of *Madho Singh v. Thakoor Pershad* (1) was a judgment of my own concurred in by my colleague Mr. Justice Spankie, and is correctly stated as an authority in support of the opinion that the cause of action in the case of an instalment-bond accrues on the first default, whence limitation begins to run. The appeal is dismissed with costs in all the Courts.

*Appeal dismissed.*

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April 30.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

BUJHAWAN LAL (DEFENDANT) v. SUKHAJ BAI (PLAINTIFF).\*

*Attachment—Cross-decrees—Act VIII of 1859 (Civil Procedure Code), s. 209.*

In April, 1877, *M* sued *S* for money and on the 10th May, 1877, *S* sued *M* for money, both suits being instituted in the same Court. In the meantime, on the 9th May, 1877, *B* applied for the attachment of the money claimed by *M* in his suit, and obtained an order prohibiting *M* from receiving, and *S* from paying, any sum which might be found in that suit to be due by *S* to *M*. On the 23rd June, 1877, *M* obtained a decree in his suit against *S*, and *S* obtained a decree in his suit against *M*, *S*'s decree being for the larger sum. On the same day, under the provisions of s. 209 of Act VIII of 1859, satisfaction for the smaller sum was entered on both decrees, and execution taken out of *S*'s decree for so much as remained due. At the same time *S* objected to *B*'s attachment, but his objection was disallowed. *Held*, in a suit by *S* against *B* to have the order disallowing his objection set aside and the propriety and legality of the set-off above mentioned established, regard being had to the provisions of s. 209 of Act VIII of 1859, that the attaching order of the 9th May could have no operation or effect, and that, even if *B* had followed up that order and attached *M*'s decree against *S*, that step would not have put him in a better position, for the same section being followed, and the decrees being essentially cross-decrees, that for the smaller sum became absorbed in the one for the larger, and attachment could not affect it.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

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\* Second Appeal, No. 1139 of 1879, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 25th July, 1879, reversing a decree of Babu Nilmadhab Roy, Munsif of Ghazipur, dated the 14th May, 1879.

(1) H. C. R., N.-W. P., 1873, p. 35.

Munshi *Kashi Prasad*, for the appellant.

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Munshi *Hanuman Prasad*, for the respondent.

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The judgment of the High Court (PEARSON, J., and STRAIGHT, J.,) was delivered by

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STRAIGHT, J.—The following facts must be recapitulated in order to make the grounds upon which this appeal is based intelligible. On the 24th April, 1877, Mahadeo Lal, defendant No. 2, brought a suit for work done and materials provided against Sukhraj Rai, the plaintiff. On the 10th May, 1877, Sukhraj Rai, the plaintiff, instituted a suit on a bond against Mahadeo Lal, defendant No. 2. On the 23rd June, 1877, the claim in each case was decreed, that of Sukhraj Rai, the plaintiff, being for the larger amount. Meanwhile, namely, on the 9th May, 1877, Bujhawan Lal, defendant No. 1, lodged an application for attachment of the amount pending in the suit of Mahadeo Lal, defendant No. 2, against Sukhraj Rai, the plaintiff, and an order was made to that effect. It is alleged by defendant No. 1, appellant before us, that notice was issued to Mahadeo Lal, defendant No. 2, not to receive, and to Sukhraj Rai, plaintiff, not to pay, any sum that might be found to be due by the latter to the former. The receipt of any such intimation is denied by Sukhraj Rai the plaintiff, but the matter is not very important either one way or the other in the decision of this case. On the 23rd June, 1877, the plaintiff Sukhraj Rai, having obtained leave in the execution-department to set off the amount of defendant No. 2's decree against him, gave credit for the amount of that decree, and deducting it from his own decree against Mahadeo Lal, defendant No. 2, applied for execution in respect of the balance thereafter remaining due. About the same time Sukhraj Rai the plaintiff made an objection in the execution-department to defendant No. 1's attachment of the 9th May, 1877, but it was disallowed, and the present suit is brought to have the Munsif's order to that effect set aside and the propriety and legality of the set-off already mentioned established. On the 25th July, 1877, Bujhawan Lal, defendant No. 1, obtained an order for the attachment of the decretal amount of Mahadeo Lal, defendant No. 2's decree against Sukhraj Rai the plaintiff, and on the

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15th March, 1879, he brought to sale and purchased it. The present suit was dismissed by the Munsif, but upon appeal the lower appellate Court decreed the claim, and Bujhawan Lal, defendant No. 1, now appeals on the following grounds :—(i) that the decree of Mahadeo Lal against Sukhraj Rai having been previously attached, it was not competent for Sukhraj Rai to apply it as a part set-off to his decree against Mahadeo Lal ; (ii) that as the decrees were not being simultaneously executed, no set-off could be made, and even if it could, it required to be sanctioned or refused in the execution-department and cannot be made the subject of a regular suit.

The substantial point for consideration appears to be whether the order of the Munsif of the 9th May, 1877, attaching the amount of claim pending in the suit of Mahadeo Lal against Sukhraj Rai, was a good and valid one, and could effectually bar Sukhraj Rai from making a subsequent set-off of the amount of that decree in execution of a decree of his own against Mahadeo for a larger sum.

The provisions of Act VIII of 1859 are applicable to the case. It will be observed that, at the time the order of the Munsif was passed, no amount had been ascertained to be due from Sukhraj Rai to Mahadeo, and for aught that might appear to the contrary nothing was due. As a matter of fact, there was no debt owing from Sukhraj Rai to Mahadeo Lal, but Mahadeo Lal was indebted to him in a much larger amount, and when the two decrees were passed on the 23rd June, he being the holder of the decree for the larger amount was bound by the provisions of s. 209 of the old Procedure Code to take out execution for so much only as remained due to him, after deducting the amount due to Mahadeo Lal as to which satisfaction had to be entered up. As Mahadeo Lal had no claim against Sukhraj Rai and no debt was due, the order of the Munsif could have no operation or effect, and though it was possibly a wise precaution of Bujhawan Lal to get it made, his proper course would have been to follow it up by attaching the decree of Mahadeo Lal against Sukhraj Rai. This step, however, would not have put Bujhawan Lal in a better position, because s. 209 being followed and the decrees being essentially

ross-decrees, that for the smaller amount became absorbed in the one for the larger, and attachment could not affect it. The appeal, therefore, fails and is dismissed with costs.

*Appeal dismissed.*

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*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

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May 3.

OSTOCHE (PLAINTIFF) v. HARI DAS AND ANOTHER (DEPENDANTS).\*

*Declaratory Decree—Consequential Relief—Court-fees—Act VII of 1870*  
(*Court Fees Act*), s. 7, iv, sch. ii, 17, iii.

In a suit for a declaration of proprietary right in respect of a house in which the removal of an attachment of such house in the execution of a decree was sought, the plaintiff did not, as s. 7 of the *Court Fees Act* directs, state in his plaint the amount at which he valued the relief sought, nor did the Court of first instance cause him to supply this defect. On appeal by the plaintiff from the decree of the Court of first instance dismissing his suit, the lower appellate Court demanded from the plaintiff court-fees in respect of his plaint and memorandum of appeal computed on the market-value of such house, the plaintiff having only paid in respect of those documents respectively the court-fees payable in a suit for a declaration of right where no consequential relief is prayed. *Held* that the market-value of the property could not be taken by the lower appellate Court to be the value of the relief sought, as the plaintiff did not seek possession of the property, and that as the valuation of the relief sought rested with the plaintiff and not the Court, and as in this instance the declaration of right claimed necessarily carried with it the consequential relief sought, of which the value was merely nominal, further court-fees could not be demanded by the lower appellate Court from the plaintiff.

THE original plaintiff in this suit, which was instituted in the Court of the Subordinate Judge of Jaunpur, was one Abdul Rahman. He stated in his plaint that he had purchased a certain house at a sale in the execution of a decree against one Sarah Matthews, that he was unable to obtain possession of it, as it was in the possession of a mortgagee, and that his cause of action was the proclamation of the house for sale in the execution of a decree held by the defendant Hari Das against Sarah Matthews; and he claimed a declaration of his proprietary right to the house "by setting aside the order of the 13th May, 1878, maintaining the attachment of the property" in the execution of Hari Das' decree. He further stated

\* Second Appeal, No. 1342 of 1879, from a decree of G. E. Knox, Esq., Judge of Benares, dated the 16th September, 1879, affirming a decree of Paudit Jagat Narain, Subordinate Judge of Jaunpur, dated the 19th June, 1878.

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in his plaint that the market-value of the house was Rs. 1,441. He paid in respect of his plaint a court-fee of Rs. 10, being the fee payable under No. 17, iii, sch. ii of Act VII of 1870, in a suit to obtain a declaratory decree where no consequential relief is prayed. The house having been put up for sale in the execution of Hari Das' decree while the plaintiff's suit was pending, the purchaser was subsequently made a defendant in the suit. The defendants contended, *inter alia*, that the plaintiff should have paid in respect of his plaint a court-fee computed on the market-value of the house, which they alleged was not less than Rs. 3,500. The Subordinate Judge held as follows with regard to this contention :—" I think the plaintiff has properly paid his fees according to No. 17, iii, sch. ii of Act VII of 1870, as no consequential relief is asked: if the plaintiff proves his proprietary right, the attachment and sale in execution of defendant's decree will *ipso facto* be void and set aside by moving the Court in the execution-department: this view is confirmed by the ruling in *Chunia v. Ram Dial* (1): in this case the sale took place after the institution of the suit and the plaintiff did not sue for its annulment: the market-value of the property may be assumed to be Rs. 2,000, at which the plaintiff had valued it in his objection filed under s. 278, Civil Procedure Code." The Subordinate Judge then proceeded to determine the suit on the merits and dismissed it. Abdul Rahman having subsequently conveyed his rights and interests to one Ostoché, the latter appealed to the District Judge, paying in respect of his memorandum of appeal the same court-fee as had been paid in respect of the plaint. The District Judge held that the plaintiff was seeking consequential relief and ordered Ostoché to pay within a fixed period, in respect of the plaint, an additional court-fee of Rs. 200, and a similar additional court-fee in respect of his memorandum of appeal. These fees were computed on the amount alleged by the defendants to be the market-value of the house, *viz.*, Rs. 3,500. Ostoché having failed to carry out this order, the District Judge dismissed his appeal, the material portion of his decision being as follows :—" The prayer in the plaint is for cancelment of a miscellaneous order bearing date May 13th, 1878, which in turn confirmed an order of attachment and brought to sale the property in suit, and for establishment of plaintiff's proprietary

(1) L. L. R., 1 All., 360.

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right. The plaintiff-appellant is the *locum tenens* of one Abdul Rahman, who says he purchased the property claimed from Mrs. S. Matthews on the 24th August, 1876. There is on the record a paper dated 13th May, 1878, in which it is set forth by the lower Court, and admitted by both parties, that Abdul Rahman himself admits that he had never up to that date obtained possession of this property, but that it was still in the possession of one Abdullah, a mortgagor of the aforesaid Mrs. S. Matthews. This fact is also set forth in the appellant's plaint before the lower Court. It follows, therefore, that appellant's prayer cannot be looked upon as a prayer for a mere declaratory decree : such a decree could only declare him to be the purchaser of Abdul Rahman's rights—rights which have never been reduced to possession, and for which he could not sue in this way, seeing that he was able to seek further relief and omitted to do so. The prayer for establishment of proprietary right must be looked upon as a prayer for a declaratory decree with consequential relief; this being the case, appellant was directed to file the deficient duty amounting to Rs. 400 on or before the 16th of this month : as he has failed to do so, his suit must stand dismissed, and the appeal also be dismissed with costs."

The plaintiff appealed to the High Court.

Mr. *Spankie*, for the appellant, contended that possession of the house was not the relief sought in the plaint, but the removal of the attachment. The court-fees cannot be computed according to the value of a relief which is not sought. In a suit to obtain a declaratory decree where consequential relief is prayed, the court-fee should be computed according to the amount at which the relief sought is valued, and the plaintiff should state the amount at which he values it—(s. 7, iv., Court Fees Act). The plaintiff in this suit did not state the amount at which he valued the relief sought, nor was he called upon by the Court of first instance to do so. He cannot now be called upon to state it. The value of the relief sought is nominal, as, if the plaintiff obtains a declaration of right, he obtains all the relief required. The plaint and memorandum of appeal are therefore sufficiently stamped.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the respondents.



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The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

PEARSON, J.—The lower appellate Court has dismissed the appeal preferred to it apparently on the ground that the appellant had not paid a sum of Rs. 400 demanded from him as court-fees due in respect of the consequential relief sought by him in the suit on the plaint and the memorandum of appeal, and has on the same ground also dismissed his claim which had been dismissed on the merits by the Court of first instance. The lower appellate Court has assumed Rs. 3,500, the market-value of the property as alleged by the defendants, to be the value of the consequential relief sought, but the consequential relief sought was not the possession of the property, but the removal of an attachment from it.

The value of the relief sought should have been stated in the plaint. It is not stated therein; and the Court of first instance did not cause the defect to be supplied. The plaint states the value of the property to be Rs. 1,441, but that amount cannot be taken to be the value of the relief sought. Under the Court Fees Act, the valuation of the relief sought rests with the plaintiff and not with the Court. In this particular instance the declaration of the right claimed necessarily carried with it the consequential relief sought, of which the value was merely nominal. We accordingly set aside the lower appellate Court's decree and remand the case to it for fresh disposal on the merits. The costs of this appeal will follow the event.

*Cause remanded.*

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May 4.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*

THAKURYA (DEFENDANT) v. SHEO SINGH RAI AND ANOTHER (PLAINTIFFS).\*

*Suit for money due on accounts stated—Act IX of 1871 (Limitation Act), sch. ii, art. 62—Act XV of 1877 (Limitation Act), s. 2, sch. ii, art. 64—"Title" acquired under Act IX of 1871—Suit for money lent.*

The plaintiff sued the defendant for money due upon accounts stated between them in December, 1874, when Act IX of 1871 was in force. Such accounts

\* Second Appeal, No. 937 of 1879, from a decree of R. M. King, Esq., Judge of Meerut, dated the 20th June, 1879, reversing a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 24th December, 1878.

were not signed by the defendant. The suit was instituted after Act XV of 1877, which repealed Act IX of 1871, had come into force. *Held* that the plaintiff's right to sue upon such accounts within three years from the date the same were stated was not a "title" acquired under Act IX of 1871, within the meaning of s. 2 of Act XV of 1877, which, under the provisions of that section, was not affected by the repeal of Act IX of 1871, and the suit was not governed by the provisions of Act IX of 1871, but by those of Act XV of 1877, and that, therefore, the accounts not being signed by the defendant, the plaintiff could not claim the benefit of art. 64 of sch. ii of the latter Act, but must be regarded as suing merely for money lent.

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THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case to the lower appellate Court.

Mr. Conlan and Babu Jogindro Nath Chaudhri, for the appellant.

Mr. Colvin and Munshi Hanuman Prasad, for the respondents.

The High Court's (STUART, C. J., and SPANKIE, J.,) order of remand was as follows :—

ORDER OF REMAND.—The plaintiff-respondent sued to recover a sum of money upon an account stated on the 14th December, 1874, between defendant and himself, which, however, was not signed by the defendant or his agent duly authorised in this behalf. The Subordinate Judge held that the claim was barred by art. 64, sch. ii of Act XV of 1877, the new law of limitation. It is not necessary to give his reasons, which indeed are not very clear: one item of Rs. 15, however, the Subordinate Judge thought might be in time under art. 64. On the merits, however, he held that there had been no adjustment of accounts on the day named, and he appears to have discredited the plaintiff's claim altogether, including the item of Rs. 15 referred to above, and he dismissed the suit. The plaintiff in appeal to the Judge urged that Act IX of 1871 applied and not the more recent Act. The Judge, considering the bearing of s. 2, Act XV of 1877, of the words "nothing herein shall be deemed to affect any title acquired under Act IX of 1871," held that plaintiff had acquired a right under that Act to sue on accounts stated within three years from the date upon which the accounts were stated, and also that Act XV of 1877 did not bar the claim. On the merits the defendant had contended that all his accounts with plaintiff had been settled and closed in 1927 Sambat. He had failed to establish this plea, producing no accounts of his

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own, though on a former occasion he had relied upon his books in proof of money being due to him. On the other hand, the Judge, for reasons assigned by him, held the books produced by plaintiff and other evidence on his behalf to be entirely satisfactory in proof of the truth of the claim, which he decreed in full with costs, reversing the decree of the Subordinate Judge.

It is contended that the suit is certainly governed by the provisions of Act XV of 1877, that no balance in adjustment of account was proved, and that the reasons assigned by the Judge for accepting the plaintiff's accounts were insufficient. It appears to us that the Judge has misapprehended s. 2, Act XV of 1877. The words "title acquired, or to revive any right to sue barred under that Act, or under any enactment thereby repealed," do not affect the claim in the way suggested by the lower appellate Court: a right of action is one thing and the completion of a title is another thing. The plaintiff's right of action did not accrue by reason of Act IX of 1871, but because, according to his averment, on a certain day a sum of money was found to be due to him from the defendant on accounts stated between them. The limitation law simply provided a period within which the right of action must be exercised. The plaintiff acquired in this case no "title," to use the words of the Act, under Act IX of 1871, or any other Acts thereby repealed. Act XV of 1877 is certainly the law of limitation to be applied to the suit.

But the claim as brought upon an account stated is not covered by art. 64, Act XV of 1877, inasmuch as the accounts though stated in writing are not signed by the defendant or his agent duly authorised in this behalf. The plaintiff, therefore, cannot claim the benefit of this article, and if the suit is to be entertained at all, the claim must be brought under some other article in sch. ii, if the plaintiff desires to save limitation. The Judge has found in favour of the correctness of the plaintiff's accounts and the indebtedness of the defendant, and has, on the evidence, held that defendant did not settle and close accounts with plaintiff as contended in Sambat 1927. Assuming, then, that the plaintiff cannot avail himself of the limitation provided in art. 64, Act XV of 1877, he may be regarded as suing merely for money lent to the defendant, and

it may be that some portion of the moneys lent may not be barred by limitation and therefore is claimable from the defendant, and under the Judge's view of the case any such sum would still be due. The Subordinate Judge has suggested that Rs. 15 are within the period of limitation, if art. 64 does not apply to the claim, but this would not be sufficient to enable us to dispose of the appeal.

The Judge should ascertain and determine whether any and what sums included in the claim are within the period of limitation of three years from the dates of the loans of such sums, and return his finding on this issue. On receipt of the finding one week will be allowed for objections, and at the expiration thereof the appeal will be decided.

*Cause remanded.*

*Before Mr. Justice Pearson and Mr. Justice Straight.*

SHEO PARTAB NABAIN SINGH (DEFENDANT) v. SHEO GHOLAM SINGH (PLAINTIFF).\*

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*Appeal when presented—Memorandum of Appeal insufficiently stamped—Act X of 1877 (Civil Procedure Code), s. 54 (b)—Limitation.*

For the purposes of limitation, an appeal is preferred when the memorandum of appeal is presented to the proper officer, and not when, where the memorandum of appeal is insufficiently stamped and is returned in order that the deficiency may be supplied, it is again presented (1).

When an appellate Court returns an insufficiently stamped memorandum of appeal in order that it may be sufficiently stamped, it should fix a time within which the deficiency is to be supplied (2).

THE defendant in this suit preferred an appeal from the decree of the Court of first instance on the 23rd June, 1879, within the period of limitation allowed by law. The lower appellate Court, on the 5th July, 1879, being of opinion that the memorandum of appeal was written upon paper insufficiently stamped, returned it to the defendant in order that the requisite stamp-paper might be supplied, without fixing any time within which the same should be supplied. On the 18th July, 1880, the defendant, having supplied the requisite stamp-paper, again presented the memorandum of

\* Second Appeal, No. 1322 of 1879, from an order of J. W. Power, Esq., Judge of Ghazipur, dated the 18th July, 1879, rejecting a memorandum of appeal from a decree of Munshi Manmohan Lal, Munsif of Ghazipur, dated the 26th May, 1879.

(1) See also *Jagan Nath v. Lalman*, I. L. R., 1 All., 260, and the Indian Limitation Act, s. 4, Explanation.

(2) See also *Jagan Nath v. Lalman*, I. L. R., 1 All., 260.

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appeal to the lower appellate Court. The lower appellate Court rejected it on the ground that the time prescribed by law for the appeal had expired.

The defendant appealed to the High Court.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellant.

Munshi *Hanuman Prasad* and Lala *Lalta Prasad*, for the respondent.

The portion of the judgment of the Court (PEARSON, J., and STRAIGHT, J.,) material to the purposes of this report was as follows :—

PEARSON, J.—The memorandum of appeal to the lower appellate Court was presented on the 23rd June, 1879, admittedly within time. The lower appellate Court was therefore wrong in declaring on the 18th July following that the appeal was not within time. The orders passed by the lower appellate Court on the 23rd June and 5th July in the matter of the deficiency of the court-fee were not in accordance with the provisions of s. 54 (b), Act X of 1877. The Judge should have fixed a time within which the deficiency was to be paid up, and on the expiry of that period, in the event of its not being paid up, should have rejected the appeal.

Having regard to the irregularity of the lower appellate Court's procedure, we must allow the appeal, and, reversing the Judge's order, direct him to place the appeal on his file and proceed to dispose of it according to law. We make no order as to costs.

*Appeal allowed.*

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 May 5.

## FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spinkie, Mr. Justice Oldfield, and Mr. Justice Straight.*

ISRI SINGH (DEFENDANT) v. GANGA AND ANOTHER (PLAINTIFFS).\*

*Wajib-ul-arz—Pre-emption—Act XIX of 1873 (N.-W. P. Land-Revenue Act), ss. 61, 65, 91, 257—Record-of-Rights.*

A *wajib-ul-arz* prepared and attested according to law is *prima facie* evidence of the existence of any custom of pre-emption which it records, such evidence

\* Second Appeal, No. 720 of 1879, from a decree of G. E. Knox, Esq., Subordinate Judge of Allahabad, dated the 28th March, 1879, reversing a decree of Babu Mritonjoy Mukarji, Munsif of Allahabad, dated the 20th November, 1878.

being open to be rebutted by any one disputing such custom. When such a *wajib-ul-arz* records a right of pre-emption by contract between the share-holders, it is evidence of a contract binding on all the parties to it and their representatives, and there will be a presumption that all the share-holders assented to the making of the record and in consequence were consenting parties to the contract of which it is evidence, and it will be for those shareholders repudiating such contract to rebut such presumption.

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THIS was a reference to the Full Bench by a Division Bench (STUART, C. J., and STRAIGHT, J.) The facts giving rise to the reference and the points of law referred will be found stated in the order of reference, which was as follows:

STUART, C. J.—This is a second appeal from the judgment of Mr. G. E. Knox, acting with powers as a Subordinate Judge in the district of Allahabad, in a suit in which the plaintiffs claim a right of pre-emption in preference to the vendee, Babu Isri Singh, defendant No. 5, who is a stranger. The clause in the *wajib-ul-arz* is paragraph twelve, and is in these terms.—“A sharer in the patti shall have a right to purchase at the time of sale and mortgage at the price offered by a stranger in preference to a sharer in another patti.” This is certainly not very clear, and it is difficult to know what is meant by it unless we hold that “stranger” and “a sharer in another patti” are synonymous, which was probably intended, indeed, must have been intended, for otherwise the paragraph has no meaning. We may take it, then, that the paragraph means that a sharer in a patti shall have a right of pre-emption over a stranger vendee.

The Munsif found that the *wajib-ul-arz* had not been signed by the vendors, and that there was no evidence to show that they consented to be bound by its terms, and he, therefore, held that the *wajib-ul-arz* was not binding upon them or the defendant-vendee. In appeal to Mr. Knox, he found that the *wajib-ul-arz* in the case had been prepared in accordance with the rules prescribed by the Board of Revenue for the guidance of Settlement Officers under Act XIX of 1873, s. 257, and the conclusion he arrived at was, that although the *wajib-ul-arz* had not been signed by the vendors, the right of pre-emption had been “recognized” by the share-holders, and was binding on each one of the brotherhood. He therefore held that the vendors were bound to offer the share to the plaintiff

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before disposing of it to a stranger. The Subordinate Judge therefore decreed the appeal to him, reversed the decree of the Munsif, and granted the plaintiff the right of pre-emption claimed.

In second appeal to this Court it is contended, as had been found by the Munsif, that the *wajib-ul-arz*, having not only not been signed, but not having been assented to by the vendors, the paragraph respecting the right of pre-emption was not binding on them.

The word "recognized" used by the Subordinate Judge is rather a loose term in a judicial finding, but taken in connection with the Subordinate Judge's decretal order, it must mean that the *wajib-ul-arz*, though not actually signed, had been assented to and accepted by the share-holders, and the question before us is whether such assent, without actual signature, is sufficient to hold all the sharers bound by the *wajib-ul-arz* generally, and in particular by the proviso respecting the right of pre-emption. It is also to be observed that the record-of-rights in the case appears to have been prepared under s. 62 of the Revenue Act, which provides, among other things, that the record shall contain a list of all the co-sharers; and by s. 90 of the same chapter of the Act it is provided that the Board shall, from time to time, prescribe the form in which the record is to be made up. The Board have, in fact, issued rules for the formation of the record-of-rights which is to consist of three statements, the third being the *wajib-ul-arz*, which is defined to be a record of village-customs. Such being the character of the record-of-rights in the case before us, it must be presumed that the condition of pre-emption in the *wajib-ul-arz* was known to the vendors, and it was not enough to contend that it was not binding on them and their vendee simply because the *wajib-ul-arz* was not signed by them, and that there was no other evidence to show that they had expressly consented to its terms.

I have carefully examined the rulings of this Court in pre-emption suits, and the following appear to be the principle of these:— In *Chowdhree Brij Lal v. Goor Suhai* (1) it was held that the *wajib-ul-arz* is to be regarded rather as an official record of usages or agreements than as a contract. In *Sheoumber Sahoo v. Bhowanee*

(1) H. C. R., F. B., N.-W. P., 1866-67, p. 123.

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*Deen* (1) it was ruled that claims of pre-emption might be made both on contract and custom. In *Dabee Dut v. Enait Ali* (2) it was laid down that a *wajib-ul-arz* is not a mere contract, but a record of rights made by a public officer, and it would, therefore, follow that without attestation or signature by the sharers the *wajib-ul-arz* was entitled to weight as evidence of custom. In *Chadami Lal v. Muhammad Bakhsh* (3), it appears to have been decided that the *wajib-ul-arz* is a special agreement, and that it excludes evidence of custom. This perhaps, as a general proposition, is a doubtful ruling, especially in regard to another definition which has been given of the *wajib-ul-arz*, that it is a record of custom, and it is so called in the Revenue Act XIX of 1873. In *Maratib Ali v. Abdul Hakim* (4), it also appears to have been ruled, although not very clearly, that the *wajib-ul-arz* must be held to exclude evidence of custom, but that depends on the terms of the *wajib-ul-arz*, and the nature and scope of the custom: the two might not be inconsistent. And there are numerous cases not reported, in which the decisions appear to have been hastily written on the paper-books, to the effect that the *wajib-ul-arz* was *prima facie* evidence of custom, and that to be binding on sharers it was not absolutely necessary to be signed by them, but by their silence showing acquiescence, they must be understood to have accepted or acquiesced in its terms.

No exception can be taken to the record-of-rights in the present case, seeing that it has been prepared according to the provisions of the Revenue Act XIX of 1873, and the rule I deduce from the the Revenue Act and the rulings I have referred to is, that the *wajib-ul-arz* is a public record-of-rights, *prima facie* binding on all the co-sharers; that it is not binding on any sharer in the patti who has expressly repudiated it, but that it becomes a contract binding on all who may have signed it, or who may be taken by their acquiescence, express or implied, to have accepted its provisions.

Such is my understanding of the law on the subject, but I desire to refer the matter to the Full Bench of the Court with the following

- (1) H. C. R., N.-W. P., 1870, p. 223. (3) I. L. R., 1 All., 563.  
(2) H. C. R., N.-W. P., 1870, p. 395. (4) I. L. R., 1 All., 567.



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questions :—(i) Is the *wajib-ul-arz* to be regarded as a public record-of-rights, *prima facie* binding on all the co-sharers, but which may be repudiated by any of the sharers on coming into the patti? (ii) Does the *wajib-ul-arz* become a contract when it is either expressly or by necessary implication or acquiescence assented to by the co-sharers?

STRAIGHT, J.—I fully concur in the reference to the Full Bench of the two questions propounded by the learned Chief Justice.

Mr. Conlan, Mr. Colvin, and Munshi Hanuman Prasad, for the appellant.

Pandit Ajulhia Nath, Babu Oprokash Chander Mukarji, and Lala Ram Prasad, for the respondents.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—After hearing the argument addressed to us in Full Bench, I remain substantially of the opinion expressed in my referring order; but I desire now to add one or two observations. In the first place I have to express my regret that my statement of the case of *Chadami Lal v. Muhammad Bakhs* (1) is not quite accurate and scarcely does justice to my colleagues, Pearson, J., and Oldfield, J., who decided it. I state that by their judgment “it appears to have been decided that the *wajib-ul-arz* is a special agreement and that it excludes evidence of custom,” adding that “this perhaps, as a general proposition, is a doubtful ruling,” and so it undoubtedly would be as a general proposition. But again looking into the report of the case I find that the suit was for pre-emption founded on a special agreement which the *wajib-ul-arz* in that case was considered to be, “and not,” as the judgment states, “on any well-established custom apart from the contract made under the administration-paper.” So that the case really lays down no general principle of law excepting perhaps this, that a *wajib-ul-arz* may be a contract or agreement complete in itself under which evidence of any contradictory custom would be excluded.

I have next to remark that, as s. 91 of the Revenue Act XIX of 1873 was suggested at the hearing as supplying an answer to the

(1) I. L. R., 1 AN, 563.

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first question in the order of reference, that section has not in my opinion such effect. It simply provides that "all entries in the record so made and attested shall be presumed to be true until the contrary is proved." But it does not necessarily follow that such entries are *prima facie* binding on the co-sharers. On the contrary, I believe that, according to the practice recognized by the Revenue Department of these Provinces, entries in the record-of-rights are not binding on those who have attested and signed it, but they may be contested and the parties allowed to prove that the record is wrong, unless the entries have been made by order of the settlement officer when they would appear to be considered *prima facie* binding.

In regard to the second question in the order of reference, I have been struck by a remark made by my colleague Mr. Justice Spankie that, if the *wajib-ul-arz* is to be looked upon as a contract, it might be required to be stamped, and he would prefer that entries of such a nature should rather be regarded as evidence of the agreement. I gladly adopt this view which, besides stating the law in very appropriate terms, has the merit of avoiding any infringement of the Stamp Act. With these modifications, I would answer both questions put to the Full Bench in the referring order in the affirmative, leaving any further expression of my views till the case which gave rise to the reference comes back to my colleague Straight, J., and myself as the referring Division Bench.

OLDFIELD, J.—The *wajib-ul-arz* or administration-paper forms part of the record-of-rights of a mahál which is prepared under the provisions of s. 61 and following sections of the Land-Revenue Act, and with reference to the provisions of s. 65 and the rules framed under s. 257, it is a public record, *inter alia*, of customs and rights affecting the share-holders of the mahál and including such as relate to pre-emption. The right of pre-emption may be founded on the Muhammadan law, or, as is more generally the case, where it affects Hindus, on long established custom having the force of law, or on special contract between the share-holders, and the *wajib-ul-arz* may record the practice of pre-emption as based on any of these grounds, and the entry may be either evidence of custom or of the contract. The law (s. 90, Land-Revenue Act) prescribes that the record-of-rights shall be drawn up in a form and attested in a manner to be

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prescribed by the Board of Revenue, and s. 91 of the Act directs that "all entries in the record so made and attested shall be presumed to be true till the contrary is proved." Such being the legal presumption in favor of the truth of the entries in the record-of-rights, and considering the public character of the document and the publicity with which it is prepared, there can be no doubt, when it has been prepared and attested in the form and manner prescribed by the Board of Revenue, that the *wajib-ul-ars* becomes *prima facie* evidence of the existence of any custom of pre-emption which it records, open to be rebutted by any one disputing the custom; and when it records a right of pre-emption by contract between the share-holders, it is evidence of a contract binding all the parties to it and their representatives, and there will be a presumption that all the share-holders assented to the making of the entry, and in consequence were assenting parties to the contract of which it is evidence, and it will be for those repudiating the contract to rebut this presumption.

A case,—*Chadami Lal v. Muhammad Bakhsh* (1),—which was decided by Mr. Justice Pearson and me, has been noticed in the order of reference of the learned Chief Justice, and I wish to add, with reference to some remarks on the judgment in that case, that I do not find that we ruled "that the *wajib-ul-ars* is a special agreement and that it excludes evidence of custom." All we said was that the plaintiff in the case before us had brought his claim on the contract in the recent administration-paper and not on any well established custom, and we refused to allow him to shift the ground of his action, but we expressly observed that an entry of the right of pre-emption in a former administration-paper might be evidence towards proving a custom though it does not necessarily establish it.

PEARSON, J.—I concur in the remarks of my learned colleague Mr. Justice Oldfield on the questions referred to the Full Bench.

SPANKIE, J.—In reply to the first question I would say that s. 90 of Act XIX of 1873 authorises the Board of Revenue from time to time to prescribe the form in which the record to be made under the provisions of Chapter III of the Act shall be drawn up

(1) I. L. R., 1 All. 563.

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and the manner in which it shall be attested. Accordingly, orders have been drawn out by the Board, and the *khowat* and the *wajib-ul-arz*, which form a portion of the record-of-rights, are to be attested by the Settlement or Assistant Settlement Officer in the presence of all the lambardárs of each mahál or their authorised agents, and as far as possible of all other persons whom they may concern, and shall be signed by the Settlement Officer or Assistant Settlement Officer and by all the lambardárs and the patwári. When a document has been so attested, all the entries in the record shall be presumed to be true until the contrary is proved, as provided by s. 91. Such a record is *prima facie* binding on all the co-sharers, and cannot be repudiated by any one succeeding to or acquiring a share except as permitted by s. 91.

As to the second question, I would say that the *wajib-ul-arz* is a record of those arrangements made by the Settlement Officer in accordance with the provisions of s. 65, cl. (e) of which includes in the record so formed any other matters which the Settlement Officer may be directed to record under rules framed under s. 257 of the Act, and the document must be attested and drawn up as provided by s. 90 : amongst other matters the Settlement Officer is required to record the custom relating to pre-emption in the village. The *wajib-ul-arz* then is a record of village-customs. But when it relates to pre-emption, it may record the custom existing in the mahál or the agreement which the share-holders have already made amongst themselves. I do not look upon it as the contract itself, for as such it might require to be stamped, but when it recites the fact of the existence of any agreement amongst the share-holders as to the condition under which pre-emption might be claimed, I would regard the entry as evidence of that agreement. In either case, the custom, if it exists, is binding upon the share-holders, or they are bound by an agreement which can be proved, and the nature of which has been recorded in the administration-paper for the guidance and information of all the share-holders, a document in which the truth of the entries is to be presumed until the contrary be shown.

STRAIGHT, J.—I agree with my honorable colleague Mr. Justice Spankie.

1880  
May 7.

## APPELLATE CIVIL.

*Before Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Straight.*

**LACHMAN PRASAD (DEFPDANT) v. BAHADUR SINGH AND OTHERS**  
(PLAINTIFFS.) \*

*Pre-emption—Cause of Action—Conditional sale—Second appeal—Act X of 1877*  
(*Civil Procedure Code*), ss. 542, 584, 587.

*Per PEARSON, J. and STRAIGHT, J. (SPANKIE, J. dissenting)*—That in disposing of a second appeal the High Court is competent, under s. 542 of Act X of 1877, to consider the question whether the plaintiff has any cause of action or not, although such question has not been raised by the defendant-appellant in the Courts below or in his memorandum of second appeal, but is raised for the first time at the hearing of such appeal.

*Also per PEARSON, J. and STRAIGHT, J. (SPANKIE, J. dissenting).*—That the cause of action of a person claiming the right of pre-emption in the case of a conditional sale arises when the conditional sale takes place and not when it becomes absolute ; and therefore, where a conditional sale took place in 1867, and after it had become absolute a person sued to enforce his right of pre-emption in respect of the property sold, basing his claim upon a special agreement made in the interval between the date of the conditional sale and the date that it became absolute, and alleging that his cause of action arose on the latter date, that the suit was not maintainable, the plaintiff having no right of pre-emption at the time of the conditional sale.

ONE Umeda Singh on the 3rd May, 1867, executed a deed of conditional sale in respect of a two-anna share in mauza Tikarbhan in favour of Lachman Prasad, the defendant in this suit, who was not a co-sharer of the village, but a stranger. Application was made under Regulation XVII of 1806 for foreclosure, and on the 12th August, 1875, the year of grace having previously expired on the 13th February 1875, the conditional sale was declared absolute. Lachman Prasad subsequently preferred a suit against Umeda Singh for the possession of the property, and obtained a decree in execution of which on the 26th September, 1875, possession of the property was delivered to him. On the 11th December, 1875, one Jagraj Singh, a shareholder of mauza Tikarbhan, instituted the present suit against Lachman Prasad to establish his right of pre-emption in respect of the property, founding such right upon a special agreement recorded in the administra-

\* Second Appeal, No. 716 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 4th April, 1879, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 20th March, 1878.

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tion-paper of mauza Tikarbhan which was dated the 6th February, 1873. The terms of that document relating to the right of pre-emption were that the custom in the neighbourhood was that when any sharer sells his share, first his co-sharers, next his sharers in the patti, afterwards his sharers in the thoke, then a stranger, may get it, and that the proprietors of mauza Tikarbhan also approve of the aforesaid custom. While the suit was pending Jagraj Singh died and his sons were made plaintiffs in his stead. The Court of first instance dismissed the suit. On appeal by the plaintiffs the lower appellate Court gave them a decree. On second appeal by the defendant to the High Court the learned Judges of the Division Bench (PEARSON, J., and SPANKIE, J.,) before which such appeal came differed in opinion on the point whether the question whether the plaintiffs had any cause of action or not could be considered on second appeal, such question not having been raised by the defendant in the Courts below or in his memorandum of second appeal, but having been raised at the hearing of such appeal ; and on the point whether the plaintiffs had any cause of action or not.

The *Senior Government Pleader* (Lala Juala Prasad) and *Munshi Hunuman Prasad*, for the appellant.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the respondents.

The material portions of the judgments of the Judges of the Division Bench were as follows :

PEARSON, J.—But the material point for determination in my opinion is whether a valid cause and right of action accrued to Jagraj Singh on the 13th February, 1875, and that question I am free and competent to consider under s. 542 of the Procedure Code. I observe that the sale of Umeda Singh's share to the defendant did not take place on that date. His share had been sold conditionally, it is true, so long before as the 3rd of May, 1867. What happened on the 13th February, 1875, was merely that the sale became absolute. No fresh transfer was made, but the character of the transferee's possession was modified by the operation of the terms on which the original transfer had been made. The transaction commenced on the earlier and came to an end on the latter date. No new transaction was effected on the latter. The clause

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in the *wajib-ul-arz* dated 6th February, 1873, must, I conceive, be held to refer to future not to past transactions. Umeda Singh did not sell his share after the date of the *wajib-ul-arz*, but only failed to redeem it from mortgage. He was not when the year of grace was expiring in a position to offer the property to Jagraj Singh. He could not have impowered Jagraj Singh to redeem it as his substitute. At the time of conditional sale it is not shown that any right of pre-emption was possessed by the proprietors of mauza Tikarbhan. I conclude, therefore, that the present suit is unmaintainable, and I would decree the appeal without costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

SPANKIE, J.—I regret that I cannot agree with Mr. Justice Pearson in the latter part of his judgment. The objection taken by my honorable colleague is not one taken by appellant in the Court below, nor indeed in this Court. I admit that under s. 542 the Court is not confined to the grounds set forth in the memorandum of appeal. But the chapter in which the section is found refers to appeals from original decrees. I am aware that s. 587 of Act X of 1877 provides that the provisions of Chapter XII should apply as far as may be to appeals from appellate decrees. But the words "as far as may be" are of importance, and they should be considered with reference to s. 584, clauses (a), (b) and (c). On no other grounds than those allowed by the section does a second appeal lie. The objection on which my honorable colleague relies was not, as we have seen, raised below, and I doubt whether we can now set aside the Judge's decision solely upon the objection taken by my colleague. I certainly think it was for the appellant to urge that there was no valid cause and right of action on the grounds taken by my honorable colleague, and it was not for the Court to make the objection in second appeal. But, however this may be, I go further, and would say that there was no sale without power of redemption until the foreclosure had been completed, and defendant had obtained a decree for possession as owner. Until these conditions had been fulfilled the transaction was one of mortgage and a power of redemption remained. After these conditions had been fulfilled and rendered valid by decree of Court, the transaction once partaking of

a double character became a single one, and an absolute sale and possession was given under the sale-deed. On this the plaintiff's cause of action arose, and under the terms of the administration-paper, he was at liberty to bring or continue this suit.

I would remand the appeal to enable the Judge to determine the amount of the sale-consideration on payment of which the plaintiffs would be entitled to obtain the property in suit, and to fix a period within which that amount should be paid. When the lower appellate Court returns the finding on this point, one week may be allowed for objection, and on its expiration I would dispose of the appeal.

The case, in consequence of the difference of opinion between Pearson, J. and Spankie, J. was referred, under s. 575, Act X of 1877, to Straight, J. who delivered the following judgment :

STRAIGHT, J.—This appeal has been referred to me by order of the learned Chief Justice under s. 575 of the Civil Procedure Code, in consequence of a difference of opinion on points of law between Pearson, J. and Spankie, J. composing the Division Bench before whom the case originally came.

The two questions properly arising out of this reference appear to be as follows :—(i) Was it competent for Pearson, J. to dispose of the appeal on a point of law not taken in the Courts below nor raised by the appellant's pleas? (ii) If it was competent for him so to do, has he held rightly in decreeing the appeal, on the ground that no cause of action ever accrued to the plaintiffs-respondents, upon which they were entitled to maintain a suit for pre-emption?

Upon the first of these two points I think it was competent for Pearson, J. to entertain the objection that the suit could not be sustained, in the absence of any cause of action having arisen to the plaintiffs, even though such objection had not been taken in the lower Courts, and was not urged in the grounds of appeal. It is argued for the appellant that both in his original statement of defence and in the second of his pleas to this Court he substantially, if not specifically, called the plaintiff's title to sue in question. But whether this be so or not, I

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think that the terms of s. 542 of the Civil Procedure Code, so far as they are applicable to second appeals, allow the appellate Court a discretion, of which Pearson, J. was in my opinion fully justified in availing himself. The point upon which his judgment is based is purely one of law, and it arises directly upon the facts which are admitted and about which there can be no contradiction or controversy. Many cases might occur in which a careless and unreflecting use of s. 542 would cause hardship and injustice, but in the present instance the objection is simply a legal one, aiming directly at the status of the plaintiff to come into Court at all. Such an objection it seems impossible for the Court to avoid taking cognizance of in special appeal, even though it be raised for the first time at the hearing, any more than it could disregard a new point as to limitation or want of jurisdiction.

The second question for my consideration is not without difficulty, though the equities are clearly in favour of the view taken by Pearson, J. The mortgage or conditional sale-deed of the 3rd May, 1867, executed by Umeda Singh to the defendant-appellant, Lachman Prasad, for Rs. 700, charges his two-anna share in mauza Tikarbhān for three years on condition that the principal sum and interest shall be paid "within the said term, on the last day of the said term: if I fail to do so and do not get the mortgaged property freed from the mortgage, this mortgage-deed shall be considered as a conditional sale-deed and the mortgage-money a consideration therefor, and the mortgagee shall take proprietary possession of the property." From this it will be seen that the Rs. 700 with interest was to be repaid on or before the 3rd May, 1870, and then, if the mortgagor made default, the mortgagee was competent at once to take foreclosure proceedings to convert the conditional sale into an absolute one. No doubt Umeda Singh remained in possession until he was ousted by Lachman Prasad under process of law, and till the final order in the foreclosure proceedings was passed he still had his equity of redemption, but all this same time Lachman Prasad had his equitable rights and interests over the property pledged with him as security, and after the three years had expired and default had been made by the borrower, the only alternative open to Umeda Singh

was to pay the money within one year from the date of receiving notice of foreclosure, otherwise Lachman Prasad's proprietary title would by efflux of time become completely established. At the time Umeda Singh signed the *wajib-ul-arz* he could not put the land, in which Lachman Prasad was jointly interested with him, under disabilities and conditions, so to speak, of which the mortgagee had neither notice nor knowledge, nor could he make any contract which could have the retrospective effect of rendering an agreement he had already entered into incapable of fulfilment, in that other persons were to have a priority of right to purchase over the head of his conditional vendee. Whether the plaintiffs lay their cause of action as having arisen on the 13th February, 1875, when the foreclosure proceedings became final, or on the 26th September, 1875, when the defendant-appellant obtained possession, can make no difference. Umeda Singh had "no share" to offer for sale, pursuant to the terms of the *wajib-ul-arz*, and he was not in a position to fulfil its conditions, for all that remained to him till the 13th February, 1875, was his equity of redemption, which then became irretrievably lost. There was in effect no sale on that date in respect of which the plaintiffs could set up a right of pre-emption; all that took place was that the conditional vendee by operation of law became an absolute proprietor.

I am, therefore, of opinion that the view of Pearson, J. is correct upon both points referred to me, and I concur in his order that the appeal should be decreed and the decision of the first Court restored without costs.

*Appeal allowed.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

MEHDI HUSAIN (PLAINTIFF) v. MADAR BAKHSI AND OTHERS  
(DEFENDANTS).\*

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May 7.

*Error or irregularity—Court-fees—Appeal—Act X of 1877 (Civil Procedure Code), s. 578.*

The refusal of a plaintiff-respondent to make good a deficiency in court-fees in respect of his plaint when called upon to do so by the Appellate Court is not a

\* Second Appeal, No. 14 of 1880, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 1st October, 1879, reversing a decree of Maulvi Kamar-ud-din Ahmad, Munsif of Azamgarh, dated the 23rd June, 1879.

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ground upon which the Appellate Court should reverse the decree of the Court of first instance and dismiss the suit.

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THE plaintiff in this suit obtained a decree in the Court of first instance. On appeal by the defendants against this decree the lower appellate Court set it aside and dismissed the suit on the ground that the plaintiff had not sufficiently stamped his plaint, and when called upon to stamp it sufficiently refused to do so. The decision of the lower appellate Court was in the following terms:—  
“Full fees have not been paid in this suit, and the appeal is decreed and the suit is dismissed in consequence of the plaintiff respondent’s refusal to make good the value of the fees. The suit is for a declaratory decree and consequential relief and falls under s. 7, cl. iv, letter c, Act VII of 1870. In this section it is declared that the amount of fee payable in such a case shall be computed according to the amount at which the consequential relief sought is valued. Now the value of the suit is stated in the petition of plaint to be Rs. 600, and in the table of rates of *ad valorem* fees leviable on institution of suits of the Act, Rs. 45 is given as the fee chargeable. The plaintiff has paid Rs. 35 only: this finding of the Court is explained to the plaintiff in Court through his vakil, and payment of the balance being refused, this Court cannot but throw his case out. The appeal is decreed with costs and interest. The lower Court’s decision is reversed, the suit being dismissed.”

The plaintiff appealed to the High Court.

Shah *Asad Ali*, for the appellant.

Pandit *Ajudhia Nath* and *Lala Lalta Prasad*, for the respondents.

The judgment of the Court (STUART, C. J., and OLDFIELD, J.,) was as follows:

JUDGMENT.—In this case the Munsif decreed the claim, but his judgment was reversed by the Judge, not on the merits, but because the plaintiff had paid a court-fee too small for the suit, Rs. 35 instead of Rs. 45. In this view he may or may not be right, but clearly the objection is not one affecting the merits of

the case, and therefore as provided by s. 578, Act X of 1877, he ought not to have made the order he did reversing the decision of the Munsif. We must, therefore, set aside the Judge's order and direct him to try the appeal that was taken to his Court on the merits. Costs to abide the result.

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*Cause remanded.*

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

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May 13.

NASIR HUSAIN (DEFENDANT) v. MATA PRASAD AND ANOTHER (PLAINTIFFS)\*

*Voluntary alienation—Good Faith—Fraud—Consideration.*

A decree-holder instituted a suit against his judgment-debtor and the latter's son for a declaration that a gift by the judgment-debtor to his son of certain property was fraudulent, and that such property was liable to be taken in execution of the decree. *Held* that, such gift having been made by the donor out of natural love and affection for the donee and in order to secure a provision for him and his descendants, and therefore for good consideration, and having operated, and the donor having reserved to himself sufficient property to satisfy the decree, the mere fact that the donor reserved to himself no property within the jurisdiction of the Court which made the decree was not a ground for holding that such gift was fraudulent and not made in good faith, and for setting it aside and allowing the decree-holder to proceed against the property transferred by it.

The law relating to voluntary alienations explained.

The facts of this case are sufficiently stated for the purposes of this report in the order of the High Court (SPANKIE, J., and OLDFIELD, J.,) remanding the case.

The *Senior Government Pleader* (Lala Juala Prasad) and Shah Asad Ali, for the appellant.

Pandit Nand Lal and Babu Jogindro Nath Chaudhri, for the respondents.

The High Court's order of remand was as follows :—

OLDFIELD, J. (SPANKIE, J., concurring)—It appears that Zulfikar Husain executed a deed of gift dated 14th December, 1872, by which he bestowed a large portion of his property on his son Nasir Husain. The plaintiff held at the time of gift a decree against him

\* Second Appeal, No. 168 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 23rd December, 1878, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 21st December, 1877.

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dated 21st November, 1867, and the debt which was unsecured amounted at the time of institution of the suit to Rs. 4,838-15-0; and he seeks in this suit to have it declared that the deed of gift was fraudulent, that certain house-property and a garden, part of the property conveyed by it, is the property of Zulfikar Husain and is liable to be sold in satisfaction of his decree. Nasir Husain, appellant, before us, pleaded that the deed was *bonâ fide* and valid, and that his father still possesses ample property sufficient to satisfy the debt, which he reserved from the operation of the gift; that the suit is barred by limitation; and that the decree sought to be satisfied is also barred by limitation. The first Court decided that there was no valid objection on the ground of limitation taken, and that the gift was valid, being on good consideration and *bonâ fide*, and the executant had at the time reserved to himself shares in twenty-five villages with an income of Rs. 200 a month. The Judge has reversed this decree; he remarks that Zulfikar Husain "transferred by deed of gift the bulk of his property lying in many districts including Cawnpore to his son for no consideration, but merely as it is orally alleged because of his own reckless expenditure in charitable acts, charging his son with the redemption of the mortgages existing on a considerable portion of the said property, and reserving to himself for maintenance the income of some twenty-five villages, more or less, in the district of Sarun. The debts secured by mortgages are mentioned in the deed of gift but unsecured debts are not alluded to, nor is the house property in Cawnpore which appellant now seeks to attach and sell in satisfaction of his decree covered by any mortgage, nor is there mention made in the deed of any reservation of property by the donor for his own purposes. If the gift be looked on as a *bonâ fide* valid alienation, the creditor who has not been prudent enough to secure his debt by collateral security must, regardless of the distance or expense attending the effort, proceed to Sarun in Bengal to satisfy his decree from such property as his debtor may possess in that district; he may or may not find it already incumbered in a manner he did not expect. There is no authentic indication on the record of any property being reserved by the judgment-debtor to himself. It is true that respondents offer to prove it but such proceeding is unnecessary: the law protects judgment-creditors as well as their

debtors from the consequence of a fraudulent act or from that which although not exactly a fraud cannot be held to be done in good faith towards all creditors. Ordinarily the law would not presume bad faith if a judgment-debtor, when alienating a portion of his property, leaves the means to his creditors of recovering their dues from his other assets. A creditor has the power to attach his debtor's property both before and after decree, and on failure to do so he has no lien on any particular portion of the property for the discharge of his claim more than the rest; but at the same time where, as in the present case, the unincumbered property is alleged to be some hundred miles beyond the jurisdiction of the Court executing the decree, and the decree could have been satisfied from unincumbered property lying within the jurisdiction of the Court, it is neither fair nor equitable to the creditor to require him to do that which his debtor acting in good faith should have done for him, or by accepting as valid the post-decretal transfer of the property to subject him to the possibility of finding himself shut out from relief by other lien-holders' preferential claims on the residue of the property;" and the Judge concludes by not finding the alienation to be made in good faith. The Judge then seems to find that there was no good consideration for the gift and that it was not *bona fide*. But his judgment shows he has arrived at these conclusions through an inaccurate view of the law on the subject of voluntary conveyances. He holds that the conveyance, if made from a motive to provide for the son and to protect him from the consequences of the father's habit of careless expenditure in charitable purposes, cannot be held to be on good consideration, and in finding that it was fraudulent, he has rejected as quite immaterial the explanation that at the time of the gift Zulfikar Husain reserved to himself ample property to satisfy existing creditors, and has clearly been guided in his decision by the consideration that it was not only the duty of the debtor to reserve sufficient property to meet his creditors' demands, but to reserve property within the jurisdiction in which his creditors might reside or in which they might hold decrees against him; and the Judge appears even to think that a creditor who holds a decree at the time his debtor makes a voluntary conveyance of his property can claim to have it set aside, if it does not reserve property to

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meet his decree within the jurisdiction of the Court that gave the decree.

Voluntary conveyances of property liable to be taken in execution for payment of debts must be shown to be made on good consideration and to be *bond fide*, in order that they may be protected against the claims of creditors who hold claims at the time the conveyances were made; and there will be a presumption that voluntary conveyances are not *bond fide* in respect of debts that existed at the time, but this presumption will be rebutted when the circumstances of the indebtedment and the conveyances repel fraud. The law may be taken to be as given in Story's Equity Jurisprudence, 11th ed., vol. i., s. 365,—“ Mere indebtedment would not *per se* establish that a voluntary conveyance was void, even as to existing creditors, unless the other circumstances of the case justly created a presumption of fraud, actual or constructive, from the condition, state, and rank of the parties, and the direct tendency of the conveyance to impair the rights of creditors. In the latest English case, touching this subject, it was unequivocally held that a voluntary deed, made in consideration of love and affection, is not necessarily void as against the creditors of the grantor, upon the common law, or the statute of Elizabeth, but that it must be shown from the actual circumstances, that the deed was fraudulent, and necessarily tended to delay or defeat creditors.”

In the case before us the deed gives the reasons for the conveyance as follows: “I have no other male child, and through him I expect to perpetuate my name and lineage, and also because he has ever been very dear to me, and since his attaining discretion up to this day has been devoted to my service and to please me and never acted contrary to my will, I put the donee in full proprietary possession, &c;” and all rights of creditors secured by the mortgages of the said property are specially reserved by the deed.

If it be as stated that Zulfikar Husain, knowing himself to be a man of expensive habits, and out of affection for his son and in order to secure a provision for him and his descendants, made the gift in question, it cannot be said to have been made otherwise than on good consideration, and if the gift was made *bond fide*

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and had operation, there is no reason why it should not be valid; and it is clearly a most material circumstance for judging of the *bonâ fide* character of the conveyance to determine what property Zulfikar Husain reserved to himself, and whether it was sufficient to satisfy all debts existing at the time of the conveyance for which no other provision had been made, and the Judge has attached too much importance to the fact that no property was reserved within the jurisdiction of the Court that gave plaintiff's decree, since there could be no difficulty in reaching other property, the law providing for such cases.

I would remand the case in order that the Judge should re-try the issue of the *bonâ fide* character of the conveyance, after more fully ascertaining the circumstances of the conveyance and of the indebtedment of Zulfikar Husain at the time he made it, and allow ten days for objections to the finding after its submission.

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On the return of the lower appellate Court's finding the High Court (PEARSON, J., and OLDFIELD, J.,) delivered the following judgment disposing of the appeal :

OLDFIELD, J. (PEARSON, J., concurring).—We have now before us the Judge's finding on the issue remitted, and there can be no question that the deed did not operate by conveyance of the property or that it was not made on a perfectly good consideration, and there is nothing to show that, when the deed of gift was executed, the defendant had not reserved to himself ample property sufficient to meet all existing claims of creditors ; indeed, it has been found that he is now in possession of seventeen villages and has property abundantly sufficient to satisfy the present claim.

Under such circumstances it is impossible to accept the Judge's finding that the gift was not *bonâ fide* but that it was in fraud of creditors, or to permit plaintiff to have it set aside and to allow him to proceed against the property it conveyed for the satisfaction of his debt. The Judge's reason for still holding the gift to be not *bonâ fide* is the same which we held to be irrelevant in our order of remand, viz., that by the gift of the property it refers to the plaintiff has been deprived of the power of proceeding against property in his



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own neighbourhood for satisfaction of the debt. This consideration is too insignificant to stamp the gift with fraud. We decree the appeal and reverse the decree of the lower appellate Court and restore that of the first Court and dismiss the suit with all costs.

*Appeal allowed.*

1880  
May 13.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

RAM BARAN RAM (PLAINTIFF) v. SALIG RAM SINGH (DEFENDANT).\*

*Landholder and Tenant—Trees.*

*Held* that trees accede to the soil and pass to the landholder with the land on the termination of a tenancy, and unless the tenant uses, during the term of his tenancy, his privilege, where he has it, of removing the trees, he cannot do so afterwards; he would then be deemed a trespasser.

*Held* also that, where a tenant has been ejected in the execution of the decree of a Revenue Court for arrears of rent from the land forming his holding, his tenancy then terminates, and with it all right in the trees standing on such land or power of dealing with them. A person, therefore, who purchases the rights and interests of a tenant after his ejection in the execution of such a decree, cannot maintain a suit for the possession of the trees standing on the tenant's holding.

THE plaintiff in this suit claimed the possession of certain trees as having belonged to the defendant Harakh Rai, whose rights and interests had been purchased by the plaintiff at an execution sale. Harakh Rai had been the tenant with a right of occupancy of the land on which such trees were standing, but had been ejected, previously to plaintiff's auction-purchase of such trees, in the execution of a decree for arrears of rent obtained against him by the defendant Salig Ram Singh the landholder. The Court of first instance gave the plaintiff a decree on the ground that a tenant did not lose his right to the trees standing on his holding, by reason that he had been ejected from his holding in the execution of a decree for arrears of rent. On appeal by the defendant Salig Ram Singh, the lower appellate Court held that Harakh Rai had lost his right to the trees by reason of his ejection from his holding, and dismissed the plaintiff's suit.

\* Second Appeal, No. 45 of 1880, from a decree of Maulvi Muhammad Bakhsh, Additional Subordinate Judge of Gházipur, dated the 26th September, 1879, reversing a decree of Munshi Mohan Lal, Munsif of Balia, dated the 7th June, 1879.

The plaintiff appealed to the High Court.

Munshi *Hanuman Prasad* and *Lala Lalta Prasad*, for the appellant.

Munshi *Sukh Ram*, for the respondent.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.—The law may be stated to be that trees accede to the soil and pass to the landlord with the land, and unless the tenant uses, during the term of his tenancy, his privilege, where he has it, to remove the trees, he cannot do so afterwards; he would then be deemed a trespasser.

In this case the tenant had been ejected by his landlord in execution of a Revenue Court decree for arrears of rent from the land on which the trees stand, forming part of his tenant-holding; his tenancy then terminated and with it all right in the trees or power of dealing with them. The plaintiff bought the tenant's rights and interests after his eviction and cannot maintain this suit for possession of the trees.

We cannot allow the contention of the plaintiff's pleader that a tenant in this country has any right in trees standing on the land of his holding as something distinct from and independent of the tenant-right by which he holds the land, so that eviction from the land will not affect his right in the trees. It is difficult to see how he could after eviction assert any such right without being deemed a trespasser. No such right to trees is reserved by the Rent Act to an ejected tenant, the only rights reserved are by s. 42a. to the growing crops or other ungathered products of the earth belonging to the tenant, and growing on the land at the time of his ejection, and the right to use the land for the purpose of tending and gathering in such crops or other products paying adequate rent therefor. The appeal is dismissed with costs.

*Appeal dismissed.*

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RAM BARAN  
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v.  
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May 13.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

**GANRAJ DUBEY (DEFENDANT) v. SHEOZORE SINGH (PLAINTIFF).\***

*Hindu law—Joint undivided family property—Alienation—Assent of coparceners—Stranger.*

The member of a joint Hindu family who alienates his rights and interests in the family property to a stranger in blood thereby incapacitates himself from objecting to a similar alienation by another member of such family of his rights and interests in such property on the ground that such alienation was made without his consent, and such stranger is not competent to make such objection. *Ballabh Das v. Sunder Das* (1) followed.

IN September, 1878, one Kishen having died, his widow Makhtola, as mother and guardian of his minor sons, gave one Sheozore Singh a usufructuary mortgage of Kishen's landed estate, consisting of a one-third share of certain lands, and delivered possession to him. In November, 1878, Kishen's brother, Kalahal, mortgaged his own one-third share of such lands and also Kishen's one-third share to one Ganraj, who dispossessed Sheozore Singh of Kishen's share. Sheozore Singh consequently brought the present suit against Makhtola, in her own name and as guardian of Kishen's minor sons, and against Kalahal and Ganraj, for possession of Kishen's share in virtue of its mortgage to him by Makhtola in September, 1878. The defendant Ganraj contended that the mortgage to the plaintiff was invalid, as the defendant Makhtola was not the lawful wife of Kishen. The defendant Kalahal contended that he and his brother Kishen and a third brother owned and held the land jointly in equal one-third shares. The Court of first instance held that the defendant Makhtola was the lawful wife of Kishen, that she and the minor sons of Kishen were entitled to his estate, and that the mortgage to the plaintiff was good and valid, and gave the plaintiff a decree, which the lower appellate Court, on appeal by the defendant Ganraj, affirmed. Neither of the lower Courts determined whether Kishen's estate was separate and divided property or not.

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\* Second Appeal, No. 43 of 1880, from a decree of Maulvi Muhammad Bakhsh, Additional Subordinate Judge of Ghazipur, dated the 23rd September, 1879, affirming a decree of Chaudhri Jagan Nath, Muunsif of Saidpur, dated the 30th June, 1879.

(1) I. L. R., 1 All., 429.

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v.  
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On appeal to the High Court the defendant Ganraj contended, *inter alia*, that the alienation of Kishen's share of the joint family property to the plaintiff without the consent of the defendant Kalahal, a co-sharer of that property, was invalid.

The *Senior Government Pleader* (Lala Juala Prasad), for the appellant.

Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the respondent.

The portion of the judgment of the Court (PEARSON, J., and STRAIGHT, J.,) material to the purposes of this report was as follows :—

PEARSON, J.—The plea which constitutes the second ground of the appeal was not taken in the Court of first instance. There it is true Kalahal pleaded that Kishen's estate was not a separate one, but not that the mortgage made by his widow and sons was invalid because it had been made without his consent ; and Ganraj pleaded that it was invalid because she was not a lawful wife and his children were illegitimate. The plea now set up is here for the first time set up, not by Kalahal, who alone might under other circumstances, *i. e.*, if he had not by his own act incapacitated himself, have been competent to urge it, but by Ganraj, a stranger to the family, in whose mouth it does not lie,—*Ballabh Das v. Sundar Das* (1) The second ground of appeal is consequently disallowed. The appeal is dismissed with costs.

*Appeal dismissed.*

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*Before Mr. Justice Oldfield and Mr. Justice Straight.*

CHANDRA SEN (DEFENDANT) v. GANGA RAM AND ANOTHER (PLAINTIFFS).\*

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1880  
May 21.

*Hindu law—Joint Hindu family property—Alienation by Father—Son's Rights.*

G, a member of a joint undivided Hindu family consisting of himself and his sons, having wrongfully converted to his own use the property of another person, such person sued him for damages for such conversion, and obtained a decree,

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\* Second Appeal, No. 1176 of 1879, from a decree of W. Tyrrell, Esq., Judge of Bareilly, dated the 30th July, 1879, affirming a decree of Pandit Indar Narain, Munsif of Bareilly, dated the 26th May, 1879.

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in the execution of which *G's* rights and interests in the family property were put up for sale and purchased by *C*, who in execution of such decree took possession of such property. *G's* sons thereupon sued *C* to recover their shares according to Hindu law of such property. *Held per* OLDFIELD, J., that, although the father's debt was not one which the sons were in duty bound to pay, it might be that, had the family estate passed out of the family under the execution-sale, the sons could not have recovered it from *C*, who was an auction-purchaser and a stranger to the suit against the father. Inasmuch as, however, the claim in that suit was not for a joint family debt, but a personal claim against the father, who was alone represented in that suit, and the decree in that suit was against him personally, and it was only his rights and interests that were put up for sale and purchased by *C*, the sons were entitled to recover from *C* their shares of the family property. *Suraj Bansi Koer v. Sheo Persad Singh* (1) distinguished.

*Per* STRAIGHT, J.—That the sons were entitled to recover their shares of the family property, the decree being purely a personal decree against the father, and his rights and interests only in such property having been put up for sale and purchased by *C*.

THIS was a suit instituted on behalf of the two plaintiffs, who were minors, by their uncle as their next friend, for possession of a two-ninths share of a certain dwelling-house. This house was ancestral property which had descended to the plaintiffs' father, Gopal Das, and his two brothers in equal one-third shares. On the 31st July, 1878, the rights and interests of Gopal Das in the house were put up for sale in the execution of a decree for money, which one Ram Kinkar had obtained against him in a suit for damages for wrongfully converting to his own use certain jewels belonging to Ram Kinkar. Such rights and interests were purchased by the defendant in this suit. The defendant having taken possession of one-third of the house, the present suit was brought against him by the plaintiffs for possession of their shares of such one-third. The defendant contended that the suit was not maintainable, inasmuch as the family property of the plaintiffs and their father had been put up for sale in the satisfaction of a debt incurred by their father for their support, and the defendant had purchased the property in good faith. The contention that the debt had been incurred for the support of the plaintiffs was based upon the allegation that Gopal Das had converted the property of Ram Kinkar to his own use in order to maintain himself and his children during a time of famine. The Court of first instance disallowed this contention and gave the plaintiffs a

(1) I. L. R., 5 Calc., 148.

decree, which, on appeal by the defendant, the lower appellate Court affirmed, disallowing the same contention.

On appeal to the High Court the defendant contended that the property had passed to him and could not be recovered, as he was a stranger to the proceedings against Gopal Das and had purchased in good faith.

Lala *Lalta Prasad* and Mir *Zahur Husain*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

The following judgments were delivered by the Court :

OLDFIELD, J.—The plaintiffs are two minor sons of one Gopal: the latter misappropriated some jewels which were pledged to him by one Ram Kinkar, who brought a suit against him for damages and obtained a decree, and in its execution caused his judgment-debtor's rights and interests in a joint ancestral house to be sold, and appellant became the purchaser. Plaintiffs sue to recover their shares of the house. Both Courts have decreed the claim, and we consider that the appeal fails.

The law is that, when joint ancestral property has passed out of the joint family under a sale in execution for a father's debts, his sons by reason of their duty to pay his debts cannot recover the property, unless they show that the debts were contracted for immoral purposes and that the purchaser had notice that they were so contracted, and a purchaser at an execution-sale being a stranger to the suit, if he has not notice that the debts were contracted for immoral purposes, is not bound to make inquiries beyond what appears on the face of the proceedings.—*Suraj Bunsu Koer v. Sheo Persad Singh* (1).

In the case before us the debt is not one which the sons were in duty bound to pay, but it may be that, had the property passed out of the family under the sale in execution of the decree, they could not recover it from the appellant, who is an auction-purchaser and a stranger to the suit; but an examination of the suit and decree and execution-proceedings shows that no more than the right, title, and interest of the judgment-debtor in the property

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passed under the execution-sale. The claim was not for a joint family debt, but a personal claim against Gopal, who was alone represented in the suit, and the decree was against him personally for a money-claim, and it was only his right, title, and interest that was put up for sale and bought by the appellant. I would dismiss the appeal with costs.

STRAIGHT, J.—I concur in the judgment of my honorable colleague entirely on the ground that the decree was purely a personal one against Gopal, and that all that was put up and brought to sale was his right, title, and interest. The appeal should be dismissed with costs.

*Appeal dismissed.*

1880  
May 26.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

CHIMMAN SINGH (PLAINTIFF) v. SUBBAN KUAR AND OTHERS (DEFENDANTS)\*

*Act XL of 1858, s. 18—Mortgage by certificate-holder without sanction—  
Act IX of 1872 (Contract Act), s. 23.*

A mortgage by a person holding a certificate of administration in respect of the estate of a minor under Act XL of 1858 of immoveable property belonging to the minor, without the sanction of the Civil Court previously obtained, is void with reference to s. 18 of that Act and s. 23 of the Indian Contract Act, even though the mortgage-money was advanced to liquidate ancestral debts and to save ancestral property from sale in the execution of a decree.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Lala Lalta Prasad and Munshi Kashi Prasad, for the appellant.

Mr. Niblett and Babu Beni Prasad, for the respondents.

The High Court (STUART, C. J., and OLDFIELD, J.,) delivered the following

JUDGMENT.—The widows of Thamman Singh and guardians of his son the plaintiff, and of another son, Sirdar Singh, since deceased, executed on 19th July, 1870, three deeds of mortgage of property left by Thamman Singh in favour of the defendants or persons now represented by defendants. The sons of Thamman Singh were

\* First Appeal, No. 18 of 1879, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 13th December, 1878.

minors, and the widows had obtained a certificate under Act XL of 1858 in respect of the minors' estates. The plaintiff has brought this suit on attaining majority to set aside these deeds on the ground of their illegality and to recover possession of property conveyed by two of them. The deeds are (i) mortgage of 10 biswas in Dharanpur, (ii) mortgage of 10 biswas in Beharipur, (iii) mortgage of 35 biswas 4 biswansis of resumed muafi land in Dharanpur; and a ground taken by the plaintiff in the Court below was that the widows had no power to make the mortgages without the sanction of the Civil Court. The defence is that the money was advanced by defendants on the mortgages to satisfy ancestral debts and to save from sale in execution of a decree the ancestral property which had been attached and put up for sale. The Court below has held that the ground urged by the plaintiff was not one on which the deeds could be set aside, and has found this defence to be good in respect of the first and second deeds, but not in respect of the third, and the Court decreed the claim only in respect of the third deed. There are separate appeals preferred by both parties.

The plaintiff has again urged in appeal that the deeds are invalid with reference to the provisions of Act XL of 1858, and this plea is good and disposes of both appeals. The deeds of mortgage were executed by persons holding a certificate under Act XL of 1858 without the sanction of the Civil Court previously obtained, and the contracts so made are void with reference to s. 23, Indian Contract Act, since their object is of such a nature that if permitted it would defeat the provisions of s. 18, Act XL of 1858, which enacts that no person taking a certificate under the Act shall have power to sell, mortgage, &c., without the order of the Civil Court previously obtained. The following cases in point may be referred to:—S. A. No. 180 of 1870, decided the 25th March, 1870 (1); S. A. No. 1078 of 1878, decided the 17th April, 1879 (2); *Surut Chunder Chatterjee v. Ashootosh Chatterjee* (3); *Dabee Dutt Shahoo v. Subodra Bibi* (4). The appeal on the part of the plaintiff is decreed with costs, and that on the part of defendants is dismissed with costs.

(1) Unreported.

(3) 24 W. R. 46.

(2) Unreported.

(4) 25 W. R. 449.

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CHIMMAN  
SINGH  
v.  
SUBBAN  
KUAR.



1880  
May 27.

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

**KARMAN BIBI AND OTHERS (PETITIONERS) v. MISRI LAL (PLAINTIFF).\***

*Addition of Parties—Appeal—Act X of 1877 (Civil Procedure Code), ss. 32, 588—  
Act XII of 1879, s. 90 (2).*

An order refusing an application, under s. 32 of Act X of 1877, by a person to be added as a defendant in a suit is not appealable.

ONE Karman Bibi and certain other persons applied, under s. 32 of Act X of 1877, to be joined as defendants in a suit brought by one Misri Lal which was pending in the Court of the Subordinate Judge of Azamgarh. The Subordinate Judge refused this application, holding that the rights and interests of the applicants could not be dealt with in the suit, and that if they were made defendants, there might be a misjoinder of parties, and the plaintiff in the suit would be unnecessarily burdened with costs.

Karman Bibi and the other applicants appealed against this order to the High Court.

Mir Akbar Husain, for the appellants.

Lala Lalta Prasad, for the respondent.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

PEARSON, J.—Under s. 588, Act X of 1877, as amended by Act XII of 1879, orders under s. 32 striking out or adding the name of any person as plaintiff or defendant are appealable; but the order which is the subject of the present appeal is not an order of the kind above mentioned. It is an order refusing to make the appellants defendants in the suit; and there is no provision in the law for an appeal from such an order. The appeal is therefore disallowed with costs.

*Appeal dismissed.*

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\* First Appeal, No. 43 of 1880. from an order of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 6th March, 1880.

*Before Mr. Justice Oldfield and Mr. Justice Straight.*

1880  
May 27.

**HARI SINGH (DEFENDANT) v. BALDEO SINGH AND ANOTHER (PLAINTIFFS).\***

*Suit of the nature cognizable in a Small Cause Court—Haq-i-chaharum—Second Appeal.*

A suit by a zamindár for one-fourth of the price of trees cut by tenants is, when based upon contract, one of the nature cognizable in a Court of Small Causes, and consequently, where the amount claimed is under five hundred rupees, no second appeal lies in such a suit. The principle laid down in *Nanku v. The Board of Revenue* (1) followed.

THE plaintiffs in this suit claimed from the defendant Rs. 9-4-0, being one-fourth of Rs. 37, the price of certain trees cut down and sold by the defendant. The plaintiffs were the zamindárs of the land on which the trees were situated and claimed as such, the defendant being the occupancy-tenant of such land. The plaintiffs based their claim on a "*razi-nama*" dated the 10th August, 1871, and the village administration-paper in which the substance of this instrument had been recorded. This "*razi-nama*" was executed by the defendant and other tenants, who agreed therein that when any tenant cut down and sold any trees situated on his holding, the zamindárs should be allowed one-fourth of the sale-price. The village administration-paper contained a declaration to the effect that the zamindárs were entitled to one-fourth of the price of any trees cut down and sold by the tenants. The Court of first instance dismissed the suit. On appeal by the plaintiffs the lower appellate Court gave them a decree.

The defendant appealed to the High Court. On behalf of the respondents it was contended that the suit was one of the nature cognizable in a Court of Small Causes, and consequently no second appeal in the suit would lie.

*Munshi Hanuman Prasad*, for the appellant.

*Babu Oprokash Chandar Mukarji*, for the respondents.

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\* Second Appeal, No. 126 of 1880, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 29th September, 1879, reversing a decree of Shah Ahmad-ullah, Munsif of the Suburbs of Bareilly, dated the 18th July, 1879.

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v.  
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SINGH.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.,) was delivered by

STRAIGHT, J.—The lower appellate Court has found that the *razi-nama* was duly and properly executed; in other words, that the defendant agreed in writing to allow the plaintiffs "*haq-i-chaharum*." The suit was therefore for money due upon a contract and of a nature cognizable by a Small Cause Court. Accordingly no second appeal lay to this Court, and the preliminary objection taken by the respondents' pleader must prevail. Our attention was called at the hearing to the case of *Nanku v. The Board of Revenue* (1), but the view we are now taking is in no way inconsistent with, on the contrary is entirely in accordance to, the principle laid down in that case by the Court at large. The appeal is not entertainable and must be dismissed with costs.

*Appeal dismissed.*

1880  
May 31.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

CHANDIKA SINGH AND ANOTHER (DEFENDANTS) v. POHKAR SINGH  
(PLAINTIFF).\*

*Joint Mortgage—Foreclosure.*

Where a mortgage of an estate is a joint one and there is no specification in it that any individual share or portion of a share of such estate is charged with the repayment of any defined proportion of the mortgage-money, but the whole estate is made responsible for the mortgage-money, it is not competent for the mortgagee to treat a sum paid by one of the mortgagors as made on such mortgagor's own account in respect of what might be calculated as his reasonable share of the joint debt and to release his share from further liability. Where, therefore, in the case of such a mortgage the mortgagee, in taking foreclosure proceedings, exempted the person and share of the mortgagor so paying and proceeded only against the other mortgagors, and, the mortgage having been foreclosed, sued the other mortgagors for the possession of their shares of such estate, *held* that, the foreclosure proceedings being irregular, the suit was not maintainable.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

\* Second Appeal, No. 179 of 1880, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 18th December, 1879, affirming a decree of Maulvi Sakhawat Ali, Munsif of Akbarpur, dated the 16th September, 1878.

(1) I. L. R., 1 All. 444.

**Babu Jogindro Nath Chaudhri and Maulvi Obeid-ul-Rahman,**  
for the appellants.

**Munshi Hanuman Prasad,** for the respondent.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.,)  
was delivered by

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SINGH.

STRAIGHT, J.—This is a suit for possession of a one pie share of mauza Rai, pargana Ghatanpur, upon the basis of a mortgage dated the 2nd July, 1869, and a foreclosure proceeding of the 23rd May, 1878. Both the lower Courts decreed the claim and the defendants now appeal. The short facts are that the appellants with one Shankar Singh executed a conditional sale-deed to the plaintiff-respondent on the 2nd July, 1869, for a period of four years, of their one and one-half pie share of mauza Rai for an advance of Rs. 125. Some time afterwards Shankar Singh paid Rs. 62 principal and interest to date, as representing one-third of, the mortgage amount due, and the mortgagee-respondent accepted it as such and endorsed the receipt on the deed. The appellants failed to pay the balance then remaining and foreclosure proceedings were taken against them alone, Shankar Singh and his half-pie share being exempted. The usual notice was given, and when the required twelve months' grace had elapsed, the proceeding was recorded on the 23rd May, 1878, upon which the present suit was instituted. The appellants contend that as the mortgage was joint and the share of Shankar Singh was equally liable with their own for the joint debt, that the foreclosure proceedings were irregular in that he was not made a party, and that the present suit is not maintainable.

We are of opinion that this plea must prevail. The mortgage was clearly a joint one, and there is no specification in it that any individual share or portion of a share is identified to and charged with the repayment of any defined proportion of the money advanced. The liability of the mortgagors was mutual and indivisible in that their property, as a whole, was made responsible for the debt. We therefore do not think it was competent for the mortgagee to treat a sum paid by one of the mortgagors as made on such mortgagor's own account in respect of what might be

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calculated as his reasonable share of the joint indebtedness and to release his share from further liability. Such payment could only properly be treated as made for the whole of the mortgagors and ought to have been carried to the credit of all of them in reduction of the principal sum jointly due. Consequently the plaintiff-respondent was not justified in exempting the half-pie share of Shankar Singh from the foreclosure proceedings and in directing his claim against the property of the appellants alone. The present suit cannot under the circumstances be entertained. The appeal is decreed with costs.

*Appeal allowed.*

1880  
May 31.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

AKBARI BEGAM AND OTHERS (DEFENDANTS) v. WILAYAT ALI (PLAINTIFF).\*

*Remand—Objection to Finding—Appellate Court, powers of—Act X of 1877  
(Civil Procedure Code), ss. 566, 567, 578—Error or Irregularity.*

*Held* that an appellate Court is not bound to accept a finding returned to it by a Court of first instance under s. 566 of Act X of 1877 merely because no objections to such finding are preferred, but is competent to examine the evidence on which such finding is founded and to satisfy itself that it is correct and fit to be accepted. *Noorun v. Khoda Baksh* (1) dissented from: *Ratan Singh v. Wazir* (2) followed.

*Held* also that, assuming that an appellate Court, in deciding a case in a manner inconsistent with and opposed to the finding returned to it by the Court of first instance under that section, in the absence of objections, acted irregularly, its decree could not be reversed or the case remanded on account of such irregularity, such irregularity not affecting the merits of the case or the jurisdiction of the Court.

THIS suit, in which the plaintiff claimed a right of way over land belonging to the defendants, was dismissed by the Court of first instance on the 12th March, 1879. On appeal by the plaintiff the lower appellate Court, on the 29th August, 1879, remanded the case to the Court of first instance for the trial of certain issues, under the provisions of s. 566 of Act X of 1877, fixing a period of one week for objections to the finding of the Court of first instance. The

\* Second Appeal, No. 169 of 1880, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Saharanpur, dated the 18th November, 1879, reversing a decree of Munshi Baij Nath, Munsif of Muzaffarnagar, dated the 12th March, 1879.

(1) H. C. R., N.-W. P., 1866, p. 50. (2) I. L. R., 1 All., 165.

finding of the Court of first instance was adverse to the plaintiff's claim, but the plaintiff did not prefer any memorandum of objections to such finding. The lower appellate Court in due course proceeded to determine the plaintiff's appeal, and, refusing to accept the finding of the Court of first instance, recorded a finding to the contrary and reversed the decree of the Court of first instance, and gave the plaintiff a decree.

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The defendants appealed to the High Court. It was contended on their behalf that the lower appellate Court was not competent to decide the suit contrary to the finding of the Court of first instance, the plaintiff having taken no written objections to such finding.

Mr. Hill, Shah Asad Ali, and Shaikh Maula Bakhsh, for the appellants.

Pandit Bishambhar Nath, for the respondent.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.), so far as it related to this contention, was as follows :

PEARSON, J.—The main contention of the learned counsel for the appellants was outside the grounds of the appeal. He contended that the lower appellate Court was bound to accept the finding returned to it by the Court of first instance under s. 566, Act X of 1877, because no objections thereto were presented in the form of a memorandum within the time allowed, and was not free or competent to decide the case in a manner inconsistent with and opposed to such finding. In support of his contention he referred us to a decision of a Bench of this Court (Morgan, C. J., and Pearson, J.), dated 29th June, 1866 (1). In the case then decided it was pleaded in appeal that, “no objection having been raised on the part of the respondent against the Munsif's decision, under s. 354, it was improper to award a decree for fourteen bighas and six biswansis of the resumed muafi land;” and the plea was allowed, and that portion of the Munsif's judgment which had not been objected to was restored. But the question as to the meaning and intention of the terms of s. 354, Act VIII of 1859, and s. 567, Act X of 1877, has since 1866 been not unfrequently considered, and the ruling of 1866 has not been followed. A Full Bench decision—*Ratan Singh*

(1) H. C. B., N.-W. P., 1866, p. 50,

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v. *Wazir* (1)—held that, when a memorandum of objections had not been presented by a party, he might with the permission of the Court urge them orally at the hearing. In the case now before us it may be that the Subordinate Judge allowed objections to the Munsif's finding on remand to be taken orally. But, even if no objection to it was preferred in writing or orally, we are not of opinion that the lower appellate Court's duty was to accept it blindly, without examining the evidence on which it was founded and satisfying itself that it was correct and fit to be accepted.

No doubt an appellate Court would hesitate to set aside such a finding in the absence of objections, and would deem it proper to record its reasons at length for coming to a contrary conclusion. In the present case the Subordinate Judge has fully stated the grounds on which he differs from the Munsif, and makes it clear that he has given a close and intelligent attention to the points in issue and the evidence relating to them. It is impossible to hold that his action has contravened the terms of s. 567 of the Code, which merely direct that "after the expiration of the period fixed for presenting such memorandum, the appellate Court shall proceed to determine the appeal." But even had we been of opinion that the lower appellate Court's action in the matter was irregular, we should be precluded from reversing its decree or remanding the case on account of the irregularity which is not of a nature affecting the merits of the case or the jurisdiction of the Court.

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## CRIMINAL JURISDICTION.

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1880  
May 31.

*Before Mr. Justice Oldfield.*

EMPRESS OF INDIA v. ILAHI BAKHSI.

*Inquiry into case triable by Court of Session—Commitment.*

*Held*, where a Magistrate had tried a case exclusively triable by a Court of Session, and the conviction of the accused person and the sentence passed upon him at such trial were for that reason annulled by the Court of Session, but the proceedings held at such trial were not annulled, that such Magistrate might commit the accused person to the Court of Session on the evidence given before him at such trial.

(1) I. L. B., 1 All., 165.

THIS was a reference to the High Court by Mr C. J. Daniell, Sessions Judge of Moradabad, under s. 296 of Act X of 1872. One Ilahi Bakhsh preferred a complaint to Mr. J. J. D. LaTouche, Magistrate of the first class, charging a certain person with robbery. That officer, being of opinion that such charge was false and made with intent to injure such person, proceeded to try Ilahi Bakhsh for the offence of making a false charge of an offence punishable with imprisonment for seven years, an offence punishable under s. 211 of the Indian Penal Code, and on the 28th January, 1880, convicting him of such offence, sentenced him to one year's rigorous imprisonment. On appeal by Ilahi Bakhsh, the Court of Session annulled the conviction and sentence on the grounds that the Magistrate was not competent to try an offence committed against his own office or person, and that Ilahi Bakhsh was charged with committing an offence exclusively triable by the Court of Session. The Magistrate thereupon without further inquiry committed Ilahi Bakhsh for trial to the Court of Session, stating in his committing order that the grounds of committal were set forth in his decision of the 28th January, 1880. Mr. C. J. Daniell, the Sessions Judge, was of opinion that the commitment was illegal and should be quashed. His reasons for so thinking appear from the following extract from his letter referring the case to the High Court: "The decision alluded to is that given in the trial concluded on the 28th January, which trial the Sessions Judge had on 3rd April quashed, as being irregular and held by a Magistrate who was not competent to hold it. If it were otherwise regular, this order of the Sessions Judge would deprive the evidence taken in the trial of Ilahi Bakhsh held in January of any value, but it appears to me to be opposed to the provisions of Chapter XV of the Criminal Procedure Code, that a Magistrate should commit an accused person on evidence which has not been taken for the purposes of the commitment, but for the purpose of holding a trial, more specially as that trial was itself illegal. It appears to me that none of the provisions of Chapter XV have been observed in the inquiry into this case, and I do not consider myself at liberty to go on with a trial thus commenced or pass a sentence either of acquittal or conviction. Any sentence passed would be of doubtful legality."

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BAKSH.



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The following order was made by the High Court :

OLDFIELD, J. —The commitment is not vitiated because the Joint Magistrate did not commence a fresh inquiry and take evidence *de novo*. The inquiry and the evidence at the trial are sufficient for the purposes of commitment. The proceedings held at the trial were not set aside by the Judge, whose order only set aside the conviction and sentence of the accused, and though those proceedings could not form the basis of a conviction by the Magistrate, there is no reason why a commitment by the same Magistrate should not be based on them. In the analogous case when in the course of a trial the Magistrate finds that he must commit the accused to the Sessions Court, s. 221 of the Criminal Procedure Code directs that he " shall stop further proceedings under this Chapter (i.e., Chapter XVII, for trial of warrant cases) and shall commit the prisoner under the provisions hereinbefore contained," that is, under the provisions contained in Chapter XV. This direction does not mean that the Magistrate is to commence the inquiry and taken the evidence *de novo*, since his procedure under Chapter XVII in the matter of examination of the complainant and witnesses has been conducted under ss. 190 to 194 of Chapter XV (see s. 214), but only that the further procedure necessary for commitment shall be taken as directed in Chapter XV. Moreover, trial is not vitiated by mere irregularity in the proceedings up to trial. The Judge should proceed with the trial.

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—s. 194. See Act X. of 1877, s. 210.	
—s. 206. See Act IX. of 1871, sch. ii., art. 167.	
—s. 209— <i>Attachment—Cross-decrees</i> ] In April, 1877, <i>M</i> sued <i>S</i> for money, and on the 10th May, 1877, <i>S</i> sued <i>M</i> for money, both suits being instituted in the same Court. In the meantime, on the 9th May, 1877, <i>B</i> applied for the attachment of the money claimed by <i>M</i> in his suit, and obtained an order prohibiting <i>M</i> from receiving, and <i>S</i> from paying, any sum which might be found in that suit to be due by <i>S</i> to <i>M</i> . On the 23rd June, 1877, <i>M</i> obtained a decree in his suit against <i>S</i> , and <i>S</i> obtained a decree in his suit against <i>M</i> , <i>S</i> ’s decree being for the larger sum. On the same day, under the provisions of s. 209 of Act VIII of 1859, satisfaction for the smaller sum was entered on both decrees, and execution taken out of <i>S</i> ’s decree for so much as remained due. At the same time <i>S</i> objected to <i>B</i> ’s attachment, but his objection was disallowed. Held, in a suit by <i>S</i> against <i>B</i> to have the order disallowing his objection set aside and the propriety and legality of the set-off above-mentioned established, regard being had to the provisions of s. 209 of Act VIII of 1859, that the attaching order of the 9th May could have no operation or effect, and that, even if <i>B</i> had followed up that order and attached <i>M</i> ’s decree against <i>S</i> , that step would not have put him in a better position, for the same section being followed, and the decrees being essentially cross-decrees, that for the smaller sum became absorbed in the one for the larger and attachment could not affect it.	
<i>Bujhawan Lal v. Sukhraj Rai</i> ...	866
—ss. 239, 240— <i>Attachment of land—Private alienation after attachment</i> ]. Certain land was attached in the execution of a decree in the manner required by s. 235 of Act VIII. of 1859, but a copy of the order of attachment was not, as required by s. 239 of that	

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Act, fixed up in a conspicuous part or in any part at all of the Court-house of the Court executing the decree, nor was it sent or fixed up in the office of the Collector of the district in which the land was situated. Subsequently to the attachment of the land the judgment-debtor privately alienated it by sale. *Held* that, as the attachment had not been made known as prescribed by law, the provisions of s. 240 of Act VIII. of 1859 did not apply, and the sale was not null and void. *Indra Chandra v. The Agra and Masterman's Bank* followed.

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ACTS—1859—VIII., ss. 256, 257—Act XV. of 1877, s. 22—*Substitution or addition of new appellant or respondent—Appellate Court, powers of—Sale in Execution of decree—Suit for recovery of purchase money—Caveat emptor—Irregularity*]. An appellate Court has a discretionary power to substitute or add a new appellant or respondent after the period of limitation prescribed for an appeal.

The right, title, and interest of *G* in certain immoveable property was attached and notified for sale in the execution of a money decree held by *T*. It was also attached and notified for sale in the execution of a money-decree held by *S* and *R*. The same date was fixed for both sales. The officer conducting sales first sold the property in execution of *T*'s decree and *T* purchased the property. He then sold the property in execution of the decree held by *S* and *R*, and *K* purchased the property. The Court executing the decrees confirmed the sale to *T*, granting him a sale certificate, and disallowing *K*'s objection to the confirmation. It also confirmed the sale to *K*, ordering the purchase-money to be paid to *S* and *R*, and disallowing *K*'s objection to the confirmation; but it refused to grant *K* a sale certificate on the ground that, as the sale to *T* had been confirmed and a sale certificate granted to him, it could not give *K* possession of the property. In a suit by *K* against *S* and *R* to recover his purchase-money, *held*, distinguishing the suit from the cases in which it had been held that, when the right, title, and interest of a judgment-debtor in a particular property is sold, there is no warranty that he has any right, title, or interest, and therefore the auction-purchaser cannot recover his purchase-money, if it turns out that the judgment-debtor had no interest in the property, that the rule of *caveat emptor* did not apply, and the suit was maintainable.

The provisions of s. 257 of Act VIII. of 1859 apply to applications made under s. 256 of that Act and to those only.

*Held*, therefore, that, inasmuch as *K* objected to the confirmation of the sale to him on the ground that the Court was not competent to confirm a sale which had by its previous order been nullified, and not on any of the grounds mentioned in s. 256 of Act VIII. of 1859, *K* was not precluded by the terms of s. 257 of that Act from maintaining his suit.

Where the Court executing two decrees made separate orders directing the sale on the same date of certain immoveable property in execution of such decrees, the officer conducting sales was not bound to sell such property once for all in execution of both decrees, and his selling such property separately was therefore not an irregularity in the conduct of the sales.

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ss. 256, 257, 258. See Act X. of 1877, ss. 312, 315.

s. 309—*Pauper suit—Sale in execution of decree—Distribution of sale proceeds—Court-fees—Prerogative of the Crown*]. With a view to recover the amount of Court-fees which *J* would have had to pay had he not been permitted to bring a suit as a pauper, the Government caused certain property belonging to *B*, the defendant in such suit, who had been ordered by the decree in such suit to pay such amount, to be attached. This property was subsequently attached by the holder of a decree against *B* which declared a lien on the property created by a bond. The property was sold in the execution of this decree. *Held* that the Government was entitled

to be paid first out of the proceeds of such sale the amount of Court fees *J* would have had to pay had he not been allowed to sue as a pauper, the principle that Government takes precedence of all other creditors not being liable to an exception in the case of lien-holders. The decision in *Ganpat Putaya v. The Collector of Kanara* applied in this case.

- The Collector of Moradabad *v. Muhammad Daim Khan* ... 196
- ACTS**—1859—VIII., ss. 323, 324—*Arbitration*.] The plaintiff in this suit sued the defendants to recover certain moneys presented to him on his marriage, which he alleged the defendants had received and appropriated to their own use. The defendants denied that they had received such moneys, but admitted that such moneys had been credited by the plaintiff's father to the firm in which they, the plaintiff, and the plaintiff's father, were jointly interested, against a larger amount of moneys belonging to the firm which had been expended on the plaintiff's marriage. The parties agreed to refer the matter in dispute between them to arbitration, and to abide by the decision of the arbitrator. The arbitrator decided that the plaintiff could not recover the money he sued for, and which had been credited to the firm of which he was a partner, as a larger sum had been expended on his marriage out of the funds of the firm. The plaintiff obtained the opinions of certain *pandits* to the effect that, under Hindu law, gifts on marriage are regarded as separate acquisitions, and prayed that the Munsif would remit the award with these opinions to the arbitrator. The Munsif remitted the award with the opinions, requesting the arbitrator to consider them, and to return his opinion in writing within a certain period. The arbitrator having refused to act further, the Munsif proceeded to determine the suit, and gave the plaintiff a decree on the ground that, in a joint Hindu family, presents received on marriage do not fall into the common fund. *Held* (PEARSON, J., dissenting) that, there being no illegality apparent on the face of the award, the Munsif was not justified in remitting the award, or in setting the award aside and proceeding to determine the suit himself, but that he should have passed judgment in accordance with the award.
- Nanak Chand *v. Ram Narayan* ... 181
- s. 350. See Act X. of 1877, s. 578.
- s. 377—*Review of Judgment—Limitation*] The plaintiff in a suit applied, more than two years after the proper time, for a review of judgment in such suit, filing with his application a copy of a decision by the High Court, which had been passed subsequently to the date of such judgment, in support of a contention contained in his application which should have been, but was not, urged at the hearing of his suit. Such contention and the other arguments and statements contained in his application might have been adduced within the time allowed by law for an application for a review of judgment. *Held* that, as such contention might have been urged at the first hearing of the case, there was no "just and reasonable cause" for preferring the application after time, and the Court of first instance was therefore not warranted in granting the application and reviewing its judgment.
- Madho Das *v. Rukman Sewak Singh* ... 287
- XIV., s. 20—*Execution of decree—Proceeding to enforce decree—Limitation*.] Application for the execution of a decree was made on the 21st December, 1864, and in pursuance of such application the notice required by law was issued to the judgment-debtor. On the 7th February, 1865, the Court executing the decree called on the decree-holder to produce proof of the service of such notice within four days. On the 23rd February, 1865, in consequence of the decree-holder having failed to produce such proof, the Court dismissed the application. There was no proceeding either of the decree-holder or of the Court between the 7th and the 23rd February, 1865. On the 18th February, 1865, application was again made for the execution of the decree. *Held* that the proceeding of the Court

of the 23rd February, 1865, striking off the former application for default of prosecution, was not a proceeding to keep the decree alive, and the latter application was therefore beyond time.

Raghu Ram v. Danna Lal ... .. 285

ACTS—1859—XIV., s. 20.—*Limitation—Proceeding to enforce decree*] It was the object of the Legislature in Act XIV of 1859, s. 14, with regard to the limitation for the commencement of a suit, to exclude the time during which, a party to the suit may have been litigating, *bond fide* and with due diligence, before a Judge whom he has supposed to have had jurisdiction, but who yet may not have had it. The same principle prevails in the construction of s. 20, with regard to executions. *Held*, accordingly, that a proceeding, taken *bond fide* and with due diligence, before a Judge whom the judgment-creditor believed, *bond fide*, though erroneously, to have jurisdiction,—in this case the Judge himself, also, having believed that he had jurisdiction, and having acted accordingly,—was a proceeding to enforce the decree within the meaning of s. 20.

Hira Lal v. Badri Das ... .. 79

—XV., ss. 19, 23, 34.—*Suit for infringement of patent—"Public or actual" user—Measure of damages—Particulars*] *Held*, by the Court, in a suit, under Act XV of 1859, for the infringement of a patent, where the plaintiff had been in the habit of licensing the use of his invention, that the loss of the amount paid for such license was the measure of damages.

*Per SPANKIE, J.*—The meaning of the words "publicly or actually used" in s. 23 of Act XV of 1859 discussed.

*Held per SPANKIE, J.*—That, where the defendant did not allege in his written statement that the invention was publicly used at certain places prior to the date of the petition for leave to file the specification, but was allowed to give evidence that the invention was so used at such places, the plaintiff was not bound before trial to have called upon the defendant to supply the particulars as to such places, and such evidence was not admissible.

Sheen v. Johnson ... .. 368

—1860—XXVII. *See Debts.* ... ..  
—XLIII., s. 1. *See Act XXIII. of 1861, s. 27.*

—XLV., ss. 71, 146, 147, 319, 323.—*Offence made up of several offences—Rioting—Hurt*]. Rioting and hurt in the course of such rioting are distinct offences, and each offence is separately punishable.

Empress of India v. Ram Adhin ... .. 139

—s. 161.—*Attempt to obtain an illegal gratification—Act X. of 1872, ss. 218, 351.—Warrant case—Defence—Right of accused person to cross-examine the witnesses for the prosecution.—Power of the Court to summon material witnesses*]. To ask for a bribe is an attempt to obtain one, and a bribe may be asked for as effectually in implicit as in explicit terms.

Where, therefore, *B*, who was employed as a clerk in the pension department, in an interview with *A*, who was an applicant for a pension, after referring to his own influence in that department and instancing two cases in which by that influence increased pensions had been obtained, proceeded to intimate that anything might be effected by "*kar-rawai*," and on the overture being rejected concluded by declaring that *A* would rue and repent the rejection of it, *held* that the offence of attempting to obtain a bribe was consummated.

The charge having been read to the accused person he stated his defence to the same, upon which the Magistrate, the witnesses for the prosecution being in attendance, called upon the accused to cross-examine them. The accused refused to do so until he had examined the witnesses for the defence who were not in attendance. The Magistrate then discharged the witnesses for the prosecution and adjourned the trial for the production of the witnesses for the defence.

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*Held, per SPANKIE, J., that the accused was not entitled to have the witnesses for the prosecution summoned, in order that they might be cross-examined by the accused on the date fixed for the examination of the witnesses for the defence.*

*Held, also per SPANKIE, J., that the Magistrate was empowered to record both oral and documentary evidence after the witnesses for the defence had been examined.*

Empress of India v. Baldeo Sahai ... 253  
ACTS—1860—XLV, s. 174 See Act X of 1872, ss. 471, 473.

ss. 193, 471. See Act X. of 1872, ss. 468, 469, 470.  
ss. 193, 511—*Attempt—Fabricating false evidence*. *M* instigated *Z* to personate *C* and to purchase in *C*'s name certain stamped paper, in consequence of which the vendor of the stamped paper endorsed *C*'s name on such paper as the purchaser of it. *M* acted with the intention that such endorsement might be used against *C* in a judicial proceeding. *Held* that the offence of fabricating false evidence had been actually committed, and that *M* was properly convicted of abetting the commission of such offence. *Queen v. Ramsaran Chowbey* distinguished and observed on.

Empress of India v. Mula ... 105  
s. 201] *K* and *B*, having caused the death of *J*

in a field belonging to *B*, removed *J*'s dead body from that field to his own field with the intention of screening themselves from punishment. *K* was convicted on these facts of an offence under s. 301 of the Penal Code. *Held* that that section referred to persons other than the actual offenders, and *K* could not therefore properly be punished under that section for what he had done to screen himself from punishment. Also that, as a matter of fact, he did not by removing *J*'s corpse from one field to another cause any evidence of *J*'s murder, which that corpse afforded, to disappear, and his act, although his object may have been to divert suspicion from himself and *B*, did not constitute the offence defined in that section

Empress of India v. Kishna ... 713  
ss. 299, 304, 321, 323—*Culpable homicide not amounting to murder—Voluntarily causing hurt—Spleen disease*] Where

a person hurt another, who was suffering from spleen disease, intentionally, but without the intention of causing death, or causing such bodily injury as was likely to cause death, or the knowledge that he was likely by his act to cause death, and by his act caused the death of such other person, *held* that he was properly convicted under s. 323 of the Indian Penal Code of voluntarily causing hurt.

Empress of India v. Fox ... 522

s. 302—*Murder—Sentence—Judgment—Reference to High Court—Act X. of 1872 ss. 271, 287, 464.*] *L, C, K, and D*, conspired to kill *S*. In pursuance of such conspiracy *L* first and then *C* struck *S* on the head with a *tathi* and *S* fell to the ground. While *S* was lying on the ground *K* and *D* struck him on the head with their *tathis*. *Held* (STUART, C. J., dissenting) that, inasmuch as *K* and *D* did not commence the attack on *S* and it was doubtful whether *S* was not dead when they struck him, transportation for life was an adequate punishment for their offence.

Observations by STUART, C. J., on the impropriety of a judicial officer adding a "note" to his judgment in a criminal case impugning the correctness of the conclusion he has arrived at on the evidence in such case.

Empress of India v. Chatter Singh ... 33

ss. 304, 304A., 322, 325—*Culpable homicide not amounting to murder—Voluntarily causing hurt—Causing death by negligence—Spleen disease.*] *B* voluntarily caused hurt to *N*, who was suffering from spleen disease, knowing himself to be likely to cause grievous hurt, but without the intention of causing death, or causing such bodily injury as was likely to cause death, or the knowledge that he was likely by his act to cause death, and caused grievous hurt to

*N*, from which *N* died. *Held* that *B* ought not to be convicted under s. 304A of the Indian Penal Code of causing death by negligence, but under s. 325 of that Code of voluntarily causing grievous hurt.

Empress of India *v.* O'Brien.

ACTS—1860—XLV, ss. 304, 317—*Exposure of child—Culpable homicide*] Where a mother abandoned her child, with the intention of wholly abandoning it, and knowing that such abandonment was likely to cause its death, and the child died in consequence of the abandonment, *held* that she could not be convicted and punished under s. 304 and also under s. 317 of the Indian Penal Code, but s. 304 only.

Empress of India *v.* Banni ...

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... s. 370—*Buying or disposing of a person as a slave*] *R*, having obtained possession of *D*, a girl about eleven years of age, disposed of her to a third person, for value, with intent that such person should marry her, and such person received her with that intent. *Held* that *R* could not be convicted of disposing of *D* as a slave under s. 370 of the Indian Penal Code. *Queen v. Mirza Situndur Bukhut* remarked upon.

Empress of India *v.* Ram Kuar ...

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... ss. 372, 373—*Buying or selling minor for the purpose of prostitution, &c.*] Certain persons, falsely representing that a minor girl of a low caste was a member of a higher caste, induced a member of such higher caste to take her in marriage and to pay money for her in the full belief that such representation was true. *Held, per STUART, C. J.*, that such persons could not be convicted, on these facts, of offences under ss. 372 and 373 of the Indian Penal Code. *Per OLDFIELD, J.*, and *STRAIGHT, J.*, that, if such girl was disposed of for the purpose of marriage, it could not be said, because the marriage might be invalid under Hindu law, that such persons acted with the intention that she should be employed or used for the purposes of prostitution or for any unlawful and immoral purpose, or that they knew it to be likely that she would be employed or used for such purpose, and consequently they could not be convicted of an offence under those sections. *Per PEARSON, J.*, and *SPANKIE, J.*, that, such girl having been disposed of for the purpose of marriage, although the marriage might be objectionable under Hindu law, it did not appear that it was wholly invalid, and therefore such intent or knowledge could not certainly be presumed, and such persons could not be convicted of offences under those sections.

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... ss. 425, 441—Act X. of 1872 s. 454—*Criminal Trespass—Mischief.*] If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right, and without any intention to intimidate, insult, or annoy such other person, or to commit an offence, then, though he may have no right to the land, he cannot be convicted of criminal trespass.

So also, if a person deals injuriously with property in the *bona fide* belief that it is his own, he cannot be convicted of mischief.

The mere assertion, however, in such cases of a claim of right is not in itself a sufficient answer to charges of criminal trespass and mischief. It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming that the other facts are established which constitute the offence.

Where a person committed a trespass with the intention of committing mischief, thereby committing criminal trespass, and at the same time committed mischief, *held* that such person could not, under cl. iii. of s. 454 of Act X. of 1872, receive a punishment more severe than might have been awarded for either of such offences. The provisions of that law do not in such a case prohibit the Court from passing sentence in respect of each offence established.

Empress of India *v.* Budh Singh ...

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**ACTS**—1860—XLV, s. 441—*Criminal trespass*] Certain immoveable property was the joint undivided property of *C*, *G*, and a certain other person. *R* obtained a decree against *G* for the possession of such property, and such property was delivered to him in the execution of that decree in accordance with the provisions of s. 264 of Act X of 1877. *C*, in good faith, with the intention of asserting her right, and without any intention to intimidate, insult, or annoy *R*, or to commit an offence, and *G*, in like manner, with the intention of asserting the right of his co-owners, remained on such property. *Held* that, under such circumstances, they could not be convicted of criminal trespass.

Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal trespass unless the intent to commit an offence or to intimidate, insult, or annoy is conclusively proved.

In the matter of the petition of Gobind Prasad ...

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... s. 442. See Act XXVI. of 1870.

... s. 497—*Adultery—Compounding of offences—*

*Act X of 1872, s. 188.*] *N* charged *T* with having committed adultery with his wife. On inquiry into the charge by the Magistrate, the case was committed to the Sessions Court for trial when *T* was convicted. *T* appealed to the High Court. After conviction *N* and his wife were reconciled, and *N* at the hearing of the appeal asked for leave to compound the offence. *Held* that at that stage of the case sanction could not be given to withdraw the charge.

*Empress of India v. Thompson* ...

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... ss. 503, 506. See Act X. of 1872, s. 489.

—1861—XXIII, ss. 5, 7. See Act X. of 1877, s. 99.

... s. 27—*Special appeal—Suit of the nature cog-*

*nizable in a Small Cause Court—Act XLIII. of 1860, s. 1.*] *Held*, where a suit of the nature cognizable in a Court of Small Causes was instituted before Act XLIII. of 1860 came into force, and an order was made on regular appeal in execution of the decree in such suit after the passing of Act XXIII. of 1861, that the provisions of s. 27 of Act XXIII. of 1861 applied, and accordingly no special appeal would lie from such order.

*Bhichuk Singh v. Nageshar Nath* ...

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—1863—XIX, ss. 8, 9. See *Res judicata*.

—1865—XI, s. 6—*Small Cause Court—Implied contract—Mistake—Damages—Act IX of 1872, s. 72—Act X of 1877, ss. 50, 53—Plaint, amendment of*] A suit under s. 72 of the Indian Contract Act to recover from a creditor the amount of an overpayment made to him by mistake is a suit for damages, within the meaning of Act XI of 1865, s. 6, and is accordingly cognizable by a Mufassil Court of Small Causes.

*Semble* that where at the first hearing of a suit the plaintiff is returned for amendment within a fixed time under the provisions of s. 53 of Act X of 1877, and it is amended accordingly, it cannot afterwards be again returned for amendment.

*Badr-un-nisa v. Muhammad Jan* ...

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XX—*Suspension of a pleader for misconduct—*

*Special leave to appeal*] The High Court, acting regularly within its jurisdiction, suspended a pleader from practice for misconduct. The Judicial Committee, not being prepared to say, from the materials before it, that the High Court's conclusion on a pure question of fact was wrong, refused to grant special leave to appeal. It would not have followed, even if more doubt had been entertained on such a question, that an appeal would have been granted against Judges so acting.

In the matter of *F. W. Quarry*. ...

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—1866—XX, s. 17—*Bond—Mortgage—Registration*].—The immoveable property charged by a bond payable by instalments, dated



the 17th December, 1866, was charged for both principal and interest, and the first instalment was payable within three years from the date of the bond with the accumulated interest, and the amount then becoming due exceeded Rs. 100. *Held*, in a suit on the bond, that it was an instrument creating an interest in immoveable property of the value of Rs. 100 and upwards, and under s. 17 of Act XX. of 1866 required registration. *Rajpati Kuar v. Ramsukhi Kuar* followed.

*Banno v. Pir Muhammad*. ... ..

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ACTS—1868—I, s. 6. See Act III. of 1877, s. 50. Act X. of 1877, ss. 2, 3, 244, 312, 584, and 588

—1869—V, arts. 170, 171. See Act XI. of 1872, ss. 3, 9.

—XVIII, s. 34. See Act I. of 1879.

—sch. ii, No. 5. See Act IX. of 1871, sch. ii, No. 62.

—1870—VII, ss. 7, 12, 17, 28—Act X of 1877, ss. 44, 45—

*Multifarious suit*—“*Distinct subjects*”—*Plaint—Memorandum of appeal*

[*Suit for money—Power of the High Court to levy court-fees on improperly stamped document*] The plaintiffs sued in virtue of a conditional sale which had been foreclosed for (i.) possession of a house, (ii.) compensation, in the nature of rent, for its use and occupation from the date of foreclosure to the date of suit, and (iii.) like compensation from the latter date to the date on which possession of the house should be delivered to them, the defendants having purchased the house subsequently to the conditional sale but before the same was foreclosed. The plaintiffs stated that their cause of action arose on the date of foreclosure.

*Held* (SPANKIS, J., dissenting) that the suit embraced “distinct subjects” within the meaning of s. 17 of the Court Fees’ Act, 1870, and the plaint and memorandum of appeal were chargeable with the aggregate amount of fees to which the plaints or memoranda of appeal in separate suits for the different claims would have been liable.

*Held* also that, if a document which ought to bear a stamp under the Court Fees’ Act has been used in the High Court, and the mistake or inadvertence which permitted its reception in a lower Court, without being properly stamped, comes to light in the High Court, any Judge of that Court may, under s. 28 of the Court Fees’ Act, direct that it should be properly stamped.

*Per SPANKIS, J.*—That cl. ii, s. 7 of the Court Fees’ Act, did not apply to the third claim, nor was it one for money within the meaning of cl. i. of that section, but one for which s. 11 of that Act provided.

*Per OLDFIELD, J.*—That court-fees were leviable in respect of the third claim, with reference to cl. i., s. 7, and s. 11 of the Court Fees’ Act.

*Chedi Lal v. Kirath Chand* ... ..

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—s. 7 and sch. ii, 17—*Suit for a declaration of Right—Suit to set aside an order under s. 246 of Act VIII. of 1859 disallowing a claim to property under attachment—Consequential Relief*. *Held* that a suit for a declaration of the plaintiff’s proprietary right to certain moveable property attached in the execution of a decree while in the possession of the plaintiff, and for the cancellation of the order of the Court executing the decree, made under s. 246 of Act VIII. of 1859, disallowing his claim to the property, could be brought on a stamp of Rs. 20, and need not be valued according to the value of the property under attachment.

*Chunni v. Ram Dial* followed. *Mufti Jalal-ud-din Mahomed v. Shohorullah* dissented from. *Motichand Jaichand v. Dadabhai Pestanji* and *Chakalingapeshana Naicker v. Achiyar* distinguished.

*Gulzari Lal v. Jadaun Rai* ... ..

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—*Declaratory Decree—Consequential Relief—Court-fees.*—In a suit for a declaration of proprietary right in respect of a house in which the removal of an attachment of such house in the execution of a decree was sought, the plaintiff did not, as s. 7 of the Court Fees Act

directs, state in his plaint the amount at which he valued the relief sought, nor did the Court of first instance cause him to supply this defect. On appeal by the plaintiff from the decree of the Court of first instance dismissing his suit, the lower appellate Court demanded from the plaintiff court-fees in respect of his plaint and memorandum of appeal computed on the market-value of such house, the plaintiff having only paid in respect of those documents respectively the court-fees payable in a suit for a declaration of right where no consequential relief is prayed. *Held* that the market-value of the property could not be taken by the lower appellate Court to be the value of the relief sought, as the plaintiff did not seek possession of the property, and that, as the valuation of the relief sought rested with the plaintiff and not the Court, and as in this instance the declaration of right claimed necessarily carried with it the consequential relief sought, of which the value was merely nominal, further court-fees could not be demanded by the lower appellate Court from the plaintiff.

*Ostoche v. Hari Das* ... .. 869

**ACTS**—1870—VII, s. 7 and sch. ii, 17. See Act X. of 1877, s. 283.

—s. 17—Act VIII of 1859, s. 9—Act X of 1877, ss. 44, 45—*Multifarious suit*—“Distinct Subjects”—*Plaint—Memorandum of appeal*] *Held* that the words “distinct subjects” in s. 17 of the Court Fees’ Act, 1870, mean distinct and separate causes of action. *Chumaili Rani v. Ram Dai* observed on.

The plaintiff sued his brothers and a nephew for his share, according to the Hindu Law of inheritance, and under a will, of the moveable and immoveable property of his deceased uncle, by the cancellation of a deed of gift of the immoveable property in favour of the nephew. *Held, per* STUART, C. J., and STRAIGHT, J., that, under s. 17 of the Court Fees’ Act, 1870, the plaint and memorandum of appeal in the suit were chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in separate suits for the moveable and immoveable property would have been liable under that Act.

*Per* OLDFIELD, J., that court-fees were leviable on the plaint and memorandum of appeal on the total value of the claim, the suit not being one of the nature to which s. 17 of the Court Fees’ Act referred.

*Mul Chand v. Shih Charan Lal* ... .. 676

—XXVI, ss. 3, 45, 54—*Entering a Havalat with intent to convey food to Prisoner*—*Rules made by Local Government for the management and discipline of Prisons*—*House-trespass—Offence in relation to prison*—Act XLV. of 1860, s. 442—*Previous Acquittal*—Act X. of 1872, ss. 454, 460.] *Per* SPANKIE, J., and OLDFIELD, J., (STUART, C. J., doubting) that a *havalat* (lock-up) is a prison within the meaning of the Prisons Act.

*Per* STUART, C. J., that food is not an “article” within the meaning of s. 45 of that Act.

*Per* STUART, C. J., and OLDFIELD J., that the conveyance of food into a *havalat*, not being expressly prohibited by the rules made by the Local Government under s. 54 of that Act for the management and discipline of prisons, is not “contrary to the regulations of the prisons” within the meaning of s. 45 of that Act, and is therefore not an offence punishable under that section.

*Held, therefore, per* STUART, C. J., and OLDFIELD, J., that, where a person entered into a *havalat* with intent to convey or attempt to convey food to an under-trial prisoner, such act on his part did not amount to house-trespass within the meaning of s. 442 of the Indian Penal Code, and it was not an act punishable under s. 45 of the Prisons Act.

*Per* SPANKIE, J., *contra*.

*Per* STUART, C. J., that the fact that such person had been tried for house-trespass and acquitted was no bar to his being tried subsequently for an offence under s. 45 of the Prisons Act.

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ACTS—1871—	VI. See Muhammadan Law. See Jurisdiction.	...	...	301
	VIII. See Act III of 1877.			
	s. 17, cl. (2), 49— <i>Registration—Mortgage.</i> ] The value of the interest created by a mortgage of immoveable property is estimated, for the purposes of the Registration Act of 1871, not by the amount of the principal money thereby secured, but by the amount of such money and the interest payable thereon			
	Consequently, a bond dated the 9th August, 1873, which charged certain immoveable property with the payment on the 31st May, 1874, of Rs. 98, and interest thereon at the rate of one per cent. per mensem, should have been registered. <i>Darshan Singh v. Hanwanta</i> followed. <i>Navabin Lakshman v. Anant Babaji</i> differed from.			
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	...] A bond for the payment of Rs. 83-8-0, on demand, together with interest thereon at the rate of two per cent. per mensem, which charges immoveable property with such payment, does not, though the amount due on it may, in time, exceed Rs. 100, purport to create an interest of the value of Rs. 100 within the meaning of the Registration Act, and its registration is therefore optional.			
	Karan Singh v. Ram Lal	...	...	96
	The obligors of a bond for the payment of money charging land agreed to pay the principal amount, Rs. 99, within six months after the execution of the bond, and to pay interest every month on the principal amount at the rate of two per cent., and that in the event of default of payment of the interest in any month, the whole amount mentioned in the bond should become due at once. There was no stipulation preventing the obligors from repaying the loan at any time within the six months after which it was reclaimable. <i>Held</i> that the only amount certainly secured by the bond was the principal, and the bond did not therefore need to be registered.			
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	ss. 18, 50. See Act III. of 1877.			
	IX, s. 10. See Trust.			
	sch. ii, No. 62— <i>Suit for money on accounts stated—</i>			
	<i>Note or memorandum whereby an account is expressed to be balanced—</i>			
	<i>Act XVIII of 1869, sch. ii, No. 5—Stamp—Limitation</i> ] On the 9th October, 1875, the book containing the accounts between the plaintiff and the defendant, kept by the plaintiff, was examined by the parties, and a balance was struck in the plaintiff's favour which was orally approved and admitted by the defendant. On the 2nd April, 1877, the plaintiff sued the defendant for the amount of this balance "on the basis of the account-book." <i>Held</i> that the suit was in effect one on accounts stated falling within art. 62, sch. ii of Act IX of 1871, and could be brought within three years from the 9th October, 1875, for the total balance struck, and being so brought was within time.			
	<i>Held</i> also that the entry of the balance struck, not being signed by the defendant, was not a note or memorandum of the kind mentioned in No. 5, sch. ii of Act XVIII of 1869, and did not therefore require to be stamped.			
	Nand Ram v. Ram Prasad ...	...	...	641
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	art 75— <i>Bond—Waiver—Cause of Action.</i> ] The mere acceptance by the obligee of a bond payable by instalments, which provides that in case of failure to pay one or more instalments the whole amount of the bond due shall become payable, of instalments after default does not constitute a "waiver," within the meaning of art. 75, sch. ii of Act IX of 1871 of the obligee's right to enforce such provision.			

In the case of such a bond the cause of action arises on the first default, and limitation runs from the date of such default.

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ACTS—1871—IX, sch. ii, art. 167—*Execution of Decree—Limitation.*] The words “where there has been an appeal” in cl. 2, art 167 of sch. ii. of Act IX. of 1871, contemplate and mean an appeal from the decree, and do not include an appeal from an order dismissing an application to set aside a decree under s. 119 of Act VIII. of 1859.

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*Execution of decree—Decree for money payable by instalments—Adjustment of decree—Act VIII. of 1859, s. 206.*] A decree for the payment of money by instalments directed that, if the judgment-debtor failed to pay two instalments in succession, the decree-holder should be entitled to enforce payment of the whole amount due under the decree. The decree-holder, alleging that a portion of the ninth instalment was payable, and that the whole of the tenth (the last) instalment was due, applied to enforce payment of the moneys due under the decree.

*Held, per PEARSON J.*, that, whether former instalments had been paid or not was immaterial, and the application, being within three years from the dates on which the ninth and tenth instalments became due, was, with reference to art. 167, sch. ii. of Act IX. of 1871, within time.

SPANKIE, J. refused to interfere in second appeal, inasmuch as the lower appellate Court had found as a fact that there had been no such default in the payment of the former instalments as was contemplated by the decree.

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*Execution of decree.*]—*Held* that an application to the Court which passed a decree, that it may be sent for execution to another Court, is an application to keep such decree in force within the meaning of the Limitation Act.

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1872—I, s. 24. *See* Act X. of 1872, ss. 344, 345, 347.

s. 30—*Confession made by one of several persons being tried jointly for the same offence*] Where the confession of a person being tried jointly with other persons did not implicate him to the same extent as it implicated such other persons, and was not sufficient of itself to justify his conviction, *held* that such confession could not be taken into consideration under s. 30 of Act I of 1872 against such other persons. *Queen v. Belat Ali* followed.

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ss. 30, 33—*Trial by the Court of Session—Admissibility of evidence given at preliminary inquiry by absent witness—Confession made by one of several persons being tried jointly—Act X of 1872, s. 249*] *Held* that it is only in extreme cases of delay or expense that the personal attendance of a witness before the Court of Session should be dispensed with, and the evidence given by him before the committing Magistrate referred to.

*Held* also, where a person being tried jointly with other persons made a statement deprecating any guilty knowledge and seeking to clear himself at the expense of such other persons, that such statement could not be taken into consideration under s. 30 of Act I of 1872 against such other persons. *Queen v. Belat Ali* and *Empress v. Ganraj* followed.

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ss. 92, 95. *See* Act XV. of 1877, s. 4.

s. 108. *See* Muhammandan Law.

s. 115. *See* Hindu Law.

s. 118—Act X of 1872, ss. 149, 272—*Arrest pending appeal—Admissibility of the evidence of the respondent against*

another person concerned in the same offence—*Accomplices*] *K* and *B* were accused of being concerned in the same offence. *K* was first apprehended, and the Magistrate inquired into the charge against him, and committed him for trial, but the Court of Session acquitted *K*. The Local Government preferred an appeal against his acquittal, and the Magistrate arrested him with a view to his detention in custody until such appeal was determined. While *K* was so detained, the Magistrate inquired into the charge against *B*, who had meanwhile been arrested, and made *K* a witness for the prosecution, and committed *B* for trial. *K*'s evidence was taken on *B*'s trial.

*Held per* STUART, C. J. (SPANKIN, J., doubting), that *K*'s arrest was lawful, and that his evidence was admissible against *B*.

*Held per* SPANKIN, J., that, assuming that the Magistrate looked on *K* as an accused person and his arrest was lawful, the Magistrate should not have examined him as a witness against *B*, and that, assuming that *K*'s arrest was unlawful and that when he made his statements he was a free man, his evidence, if admissible, was not evidence on which a Court should place much reliance.

*Empress of India v. Karim Bakhsh* ...

ACTS—1872—IX, s. 23—*Government Ferry—Lease*  
—*Regulation VI of 1819—Illegality of contract*] *M* took a lease for three years of a Government ferry and covenanted with the Magistrate, who granted the lease, not to underlet or assign the lease without leave or license of the Magistrate. *M* subsequently admitted *B* as his partner to share with him equally in the profits to be derived from the lease. *Held* that such partnership was not void by reason of the covenant not to underlet or assign the lease.

S. A. No. 119 of 1872, decided on the 1st August, 1872, overruled.

*Gauri Shankar v. Mumtaz Ali Khan* ...

—*See Mortgage.*

—s. 65. *See Insolvent.*

—s. 72. *See Act XI. of 1865.*

—s. 92—*Bill of Exchange—Exclusion of Evidence of*

*Oral Agreement*] It was agreed between the Bank of Bengal at Calcutta and *C* and *Co.*, who carried on business there, that the Branch of the Bank at Cawnpore should discount bills to a certain extent drawn by *C.*, who carried on business at Cawnpore, on *C* and *Co.* against goods to be consigned by rail to *C* and *Co.*, and that the railway receipts for such consignments should be forwarded to *C* and *Co.* through the Cawnpore Branch of the Bank. *C* accordingly drew a bill on *C* and *Co.* payable twenty-one days after date, which the Cawnpore Branch of the Bank discounted, receiving the railway receipt for certain goods consigned to *C* and *Co.* *C* and *Co.* having accepted this bill, the Bank handed over the railway receipt to them. In a suit by the Bank against *C*, on the bill, the latter set up as a defence that the bill had been discounted by the Bank on the oral understanding that the railway receipt was not to be transferred to *C* and *Co.* until they had paid the amount of the bill, and that the Bank had, by the breach of this condition, determined the defendant's liability. *Held* by STRAIGHT, J. (SPANKIN, J., dissenting) that evidence of such oral understanding was not admissible even under proviso 3 of s. 92 of Act I of 1872.

*Cohen v. The Bank of Bengal* ...

—X, ss. 4, 291, 415, 416, 417, 418, 419, 420—*Stolen property—High Court, powers of revision—“Judicial proceeding.”*] Where a person was accused of dishonestly receiving stolen property, knowing it to be stolen, and was discharged by the Magistrate on the ground that there was no evidence that the property was stolen, *held* that the Magistrate was competent, believing that the property was stolen, to make an order under s. 418 of Act X. of 1872 regarding its disposal.

Where there is a Court of appeal, resort should be had thereto before application is made to the High Court for the exercise of its powers of revision.

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ACTS—1872—X, ss. 44, 296—*Discharge of accused persons under s. 215—Revival of proceedings at the instance of the Court of Session—Commitment of accused persons*] Certain persons were charged under s. 417 of the Indian Penal Code, and were discharged by the Magistrate inquiring into the offence, under s. 215 of Act X of 1872. The Court of Session, considering that the accused persons had been improperly discharged, forwarded the record to the Magistrate of the District, suggesting to him to make the case over to a Subordinate Magistrate, with directions to inquire into any offence, other than the offence in respect of which the accused persons had been discharged, which the evidence on the record showed to have been committed. The Subordinate Magistrate to whom the case was made over made an inquiry, and committed the accused persons for trial before the Court of Session on charges under ss. 363 and 420 of the Indian Penal Code. It was contended that the Court of Session was not competent to “direct the accused persons to be committed,” under s. 296 of Act X of 1872, the case not being a “Sessions case,” within the meaning of that section, and that the commitment was consequently illegal. *Held* that there was no “direction to commit” within the meaning of that section, that is to say, to send the accused persons at once to the Sessions Court, without further inquiry, and whether or not the inquiry was made in consequence of the suggestions of the Court of Session was immaterial, and that the inquiry upon the charges under ss. 363 and 420 of the Penal Code was rightly held by the Subordinate Magistrate and the commitment could not be impeached ...

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s. 215—*Examination of witnesses named for the prosecution—Discharge of accused without examining all the witnesses*] Before a Magistrate discharges an accused person under s. 215 of Act X of 1872, he is bound, under that section, to examine all the witnesses named for the prosecution. *Empress v. Himatulla* followed ...

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ss. 270, 271—*Appeal by person convicted by Deputy Commissioner invested under s. 36 of Act X. of 1872—High Court.*] *Quere*—Whether, where a person has been convicted by a Deputy Commissioner invested under s. 36 of Act X. of 1872, and sentenced to a term of imprisonment requiring under that section to be confirmed by the Sessions Judge to which such Deputy Commissioner is subordinate, and such sentence has been confirmed accordingly, an appeal lies to the High Court against such conviction and sentence ...

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ss. 344, 345, 347.] *Evidence of accomplice—Confession by accused person—Act I of 1872, s. 24—Pardon.*

Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences none of which were

exclusively triable by the Court of Session, and such person was examined as a witness in the case, *held* that, the tender of pardon to such person not being warranted by s. 347 of Act X. of 1872, he could not legally be examined on oath, and his evidence was inadmissible

*Held* also that the statement made by such person was irrelevant and inadmissible as a confession, with reference to s. 344 of Act X. of 1872 and s. 24 of Act I. of 1872

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ACTS—1872—X, s. 454. *See* Act XLV. of 1860, ss. 425, 441.

— ss. 454, 460. *See* Act XXVI. of 1870, ss. 2, 45, 54.

— s. 468—Sanction to prosecute—Relative position of a Magistrate of the First Class, the Magistrate of the District, and the Court of Session]. *Held* (OLDFIELD J., dissenting) that for the purposes of s. 468 of Act X. of 1872 a Magistrate of the First Class is subordinate to the Magistrate of the District, and consequently application for sanction to prosecute a person for intentionally giving false evidence before the former may, where such sanction is refused by the former, be made to the latter, and not to the Court of Session, which has not power to give such sanction.

In the matter of the petition of Gur Dayal

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— ss. 468, 469, 470—Prosecution for offence against public justice and offence relating to document given in evidence—Nature of sanction necessary—Act XLV of 1860, ss. 193, 471—“Subordination” of Revenue Courts to High Court.] *Held* (SPRING, J., doubting); on a reference to the Full Bench, that a Court of Revenue is a Civil Court, within the meaning of ss. 468 and 469 of Act X of 1872

*Held* also that the declining by a Court of Revenue to sanction a prosecution under ss. 468 and 469 of Act X of 1872, under a mistaken view of the law and under the impression that sanction was unnecessary, did not constitute sanction.

*Held* also that under the words “at any time” in s. 470 of Act X of 1872 sanction to prosecute cannot be given after the trial and conviction of the accused person.

Observations by STUART, C. J., on the “subordination” of Courts of Revenue to the High Court, within the meaning of ss. 468 and 469 of Act X of 1872.

*Held* by the Judge making the reference (STRAIGHT, J.), on the case being returned to him, that the accused persons having been prosecuted without the sanction required by ss. 468 and 469 of Act X of 1872; all the proceedings were invalid, and must be quashed, and the accused must be retried, sanction to their prosecution having been obtained.

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— ss. 471, 473—Act XLV of 1860, s. 174.] Where a settlement officer, who was also a Magistrate, summoned, as a settlement officer, a person to attend his Court, and such person neglected to attend, and such officer, as a Magistrate, charged him with an offence under s. 174 of the Indian Penal Code, and tried and convicted him on his own charge, *held* that such conviction was, with reference to ss. 471 and 473 of Act X of 1872, illegal.

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— s. 489—Act XLV of 1860, ss. 503, 506—Security for keeping the peace—Criminal intimidation] The words in s. 489 of the Criminal Procedure Code, “taking other unlawful measures with the evident intention of committing a breach of the peace,” do not include the offence of intimidation by threatening to bring false charges.

Where, therefore, a person was convicted under ss. 503 and 506 of the Indian Penal Code of such offence, *held* that the Magistrate

by whom such person was convicted could not, under s. 489 of the Criminal Procedure Code, require him to give a personal recognizance for keeping the peace.

Empress of India v. Naghubar

**ACTS** — 1872 — X., s. 506—*Security for Good Behaviour*] Held that s. 506 of Act X of 1872 solely relates to the calling upon persons of habitually dishonest lives, and in that sense "desperate and dangerous," to find security for good behaviour, as a protection to the public against a repetition of crimes by them in which the safety of property is menaced and not the security of the person alone is jeopardised.

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Where, therefore, the evidence adduced before the Magistrate did not show that a person was "by habit a robber, house-breaker, thief, or a receiver of stolen property, knowing the same to have been stolen," but showed only that he had been guilty of acts of violence, held that the Magistrate could not, under s. 506 of Act X of 1872, order such person to furnish security.

Observations regarding the evidence on which the procedure of s. 506 should be enforced.

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XI, ss. 3, 9—*Liability of Native Indian British Subject for offence committed in Cyprus—"Native State"—Act V. of 1869, arts 170, 171—Reference—Confirmation of sentence of death—Act X. of 1872, ss 288 297—Division Court—Full Court*] Held (STUART C. J., dissenting) that a Native Indian subject of Her Majesty, being a soldier in Her Majesty's Indian army, who committed a murder in Cyprus, while on service in such army, and who was accused of such offence at Agra, might, under s. 9 of Act XI. of 1872, be dealt with in respect of such offence by the Criminal Courts at Agra, Cyprus being a "Native State," in reference to Native Indian subjects of Her Majesty, within the meaning of that Act.

Per STUART, C. J.—The power of the Governor-General of India in Council to make laws for the trial and punishment in British India of offences committed by British Indian subjects in British territories other than British India discussed.

A Division Court of the High Court ordered the Magistrate who had refused to inquire into a charge of murder on the ground that he had no jurisdiction to inquire into such charge, considering that the Magistrate had jurisdiction to make such inquiry. The Magistrate inquired into the charge and committed the accused person for trial. The Court of Session convicted the accused person on the charge and sentenced him to death. The proceedings of the Court of Session having been referred to the High Court for confirmation of the sentence, the case came before the Full Court.

Held per STUART, C. J., SPANKIE, J., and OLDFIELD, J., that in determining whether such sentence should be confirmed, the Full Court was not precluded by the order of the Division Court from considering whether the accused person had been convicted by a Court of competent jurisdiction.

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1873—XV., ss. 40, 43—*Suit against Secretary to Municipal Committee—Substitution of president as defendant—Act XV of 1877, s. 22*. Where, after a notice required by s. 43 of Act XV of 1873 had been left at the office of a Municipal Committee, such Committee were sued within three months of the accrual of the plaintiff's cause of action in the name of their Secretary, instead of the name of their President, as required by s. 40 of Act XV. of 1873, and the plaintiff applied to the Court more than three months after the accrual of his cause of action to substitute the name of the President for that of the Secretary, held that by reason of such substitution such suit could not be deemed to have been instituted against such Committee when such substitution was made, s. 22 of Act XV. of 1877 applying to the case of a person personally made a party to a



suit and not to the case of a Committee sued in the name of their officer, and that such substitution when applied for should have been made.

*Semble.*—S. 43 of Act XV. of 1873 contemplates suits in which relief of a pecuniary character is claimed for some act done under that Act by a Committee, or any of their officers, or any other person acting under their direction, and for which damages can be recovered from them personally, and not a suit against a Committee for a declaration of the plaintiff's right to reconstruct a building which has been demolished by the order of such Committee and for compensation for such demolition.

ACTS—1873—XVIII.—*Arbitration*—Act XIX. of 1873] Under the general law parties to suits may, if they are so minded, before issue joined, refer the matters in dispute between them to arbitration, and after issue joined, with the leave of the Court. 206

Act XVIII. of 1873 does not prohibit the parties to the suits mentioned therein from referring the matters in dispute between them in such suits to arbitration.

Where, therefore, the parties to a suit under that Act agreed to refer the matters in dispute between them to arbitration, after issues had been framed and evidence recorded, and applied to the Court to sanction such reference, *held* (STUART, C. J., dissenting) that the Court was competent to grant such sanction, and on receiving the award to act on it.

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Act X. of 1877, s. 32—*Dismissal or addition of parties—Revenue Court, power of*—Act XVIII of 1873, s. 106] *B* and *N*, the mortgagees of a mahál, granted the mortgagors a lease of the mahál, the mortgagors agreeing to pay "the mortgagees" a certain rent half yearly, "on account of the right they held in equal shares," and that, in default of payment of such rent, "the mortgagees" should be entitled to sue for payment. The mortgagors having made default in payment of the rent, and *N* refusing to join in a suit against the mortgagors to enforce payment, *B* sued them alone for a moiety of the rent due. The Revenue Court of first instance held, with reference to s. 106 of Act XVIII. of 1873, that *B* could not sue separately. *Held* by the High Court that the order of the Revenue Court of first appeal directing, *inter alia*, that the Court of first instance should retry the suit after making *N* a defendant in the suit was not illegal, notwithstanding that the provisions of s. 32 of Act X. of 1877 were not made applicable to the procedure of the Revenue Court by Act XVIII of 1873.

*Held per SPANKIN, J.*, that s. 106 of Act XVII of 1873 did not apply, and *B* was entitled separately to sue for the whole of the rent.

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ss. 3, 31, 209—*Land in mahál held by the lambardar as "khud-kasht" at a nominal rental—Liability of lambardar to co-sharer for profits.*] The land in a certain mahál was recorded as held by *M*, the lambardar, as "khud-kasht" at a certain nominal rental. For two years in succession *M* sabbet such land in part or in whole for a less amount than such nominal rental; the third year such land lay fallow. Certain persons sued as co-sharers in the mahál to recover from *M* their share of the profits on account of such years. *M* set up as a defence to the suit that there were no profits, on the contrary, a small loss. The lower Courts held *M* answerable for the rental recorded.

*Held* that it was doubtful whether the provisions of s. 209 of Act XVIII. of 1873 were applicable in the present case, and that, even if such provisions were applicable, the lower Courts having neither found that more was realized from the land than had been accounted for by *M*, nor that the failure to realize more was owing to gross

negligence or misconduct on his part, the decree of the lower Courts could not be sustained.

**CTS—Mangal Khan v. Mumtaz Ali** ... .. 239  
 1873—XVIII, ss. 7, 9—*Sale of proprietary rights in a mahál—Right of occupancy—Ex-proprietary tenant*] The right of occupancy which a person losing or parting with the proprietary rights in a mahál acquires, under s. 7 of Act XVIII of 1873, in the land held by him as sir in such mahál at the date of such loss or parting is a saleable interest.

*Held*, where such a right was sold by private sale, that it was transferable, s. 9 of Act XVIII of 1873 notwithstanding. *Umrao Begam v. The Land Mortgage Bank of India* followed. A deed executed by a village proprietor purporting to transfer his share in the village including his sir-land and ex-proprietary right divests such proprietor of the ex-proprietary right conferred by s. 7 of Act XVIII of 1873.

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s. 9—*Tenant at a fixed rate—Ex-proprietary tenant—Occupancy tenant—Inheritance to rights of occupancy.*] *Held* that the proviso to the last clause of s. 9 of Act XVIII. of 1873 refers only to the holdings of ex-proprietary tenants and occupancy tenants and not to tenants at fixed rates.

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ss. 9; 171—*Land-holder—Right of Occupancy tenant—Transfer of Right of Occupancy in Execution of Decree*] *Held* (SPANKIN, J., dissenting), affirming the decision of a Division Bench of the High Court in this case that s. 9 of Act XVIII of 1873 does not prevent a land-holder from causing the sale in execution of his own decree of the occupancy-rights of his own judgment-debtor in land belonging to himself.

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ss. 30, 95. *See Jurisdiction.*

s. 93 (c)—*Suit for cancelment of lease—Breach of conditions involving forfeiture*] The plaintiff, the representative in title of a lessor, sued under cl. (c), s. 93 of Act XVIII of 1873, for the cancelment of a lease, on three grounds, viz., on the ground that the lessees had paid the rent to the Collector, on account of the revenue due in respect of the estate, instead of to him; secondly, on the ground that they had failed to pay certain instalments of rent on the due dates; and thirdly, on the ground that they had planted trees and sunk wells, and allowed their tenants to do the same, without the lessor's consent; thereby committing breaches of the conditions of the lease involving its forfeiture. *Held*, on the construction of the lease, with reference to the first ground, that as the lease was intended to be perpetual, and as the rent had been paid to the Collector for many years under an arrangement effected between the parties to the lease, and it was not shown that the plaintiff had repudiated this arrangement (even if he had the power of so doing) or demanded payment of the rent directly to himself, payment of rent by the lessees to the Collector did not amount to a breach of the conditions of the lease; with reference to the second ground, that the lease being intended to be perpetual, and no arrears of rent being due, irregularity and unpunctuality in the payment of the instalments of rent in question were not breaches of the conditions of the lease involving its forfeiture; and, with reference to the third ground, that the condition as to the planting of trees and sinking wells being merely a prohibition, and not a condition the breach of which involved the forfeiture of the lease, the lease could not be cancelled because the lessees had planted trees or sunk wells, and allowed their tenants to do the same, without the lessor's consent.

*Held* also that, assuming that the lessor was entitled, on the third ground, to the cancelment of the lease, cancelment was not to be deemed the invariable penalty for the breach of such a condition as

that mentioned in that ground. The Full Bench ruling in *Sheo Chuan v. Busunt Singh* followed

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ACTS—1873—XVIII, s. 95, cl. (m) and (n)—*Wrongful dispossession of land—Compensation for wrongful dispossession—Jurisdiction*] In an estate held by S as a sub-proprietor he held certain land with a right of occupancy. G, the zemindar, obtained a decree against S in a Civil Court for the possession of the estate, in execution of which he ousted S from the estate including the land held by him with a right of occupancy. This decree having been set aside, S recovered the possession of the estate including such land, and sued G in the Civil Court for the value of the crops standing on such land at the time he was ousted from it by G, and for the rents of a portion of such land which G had let to tenants while in possession of it. *Held* that the suit was cognizable by the Civil Courts and that G was liable for such rents.

Sawai Ram v. Gir Prasad Singh ... .. 707

—See Jurisdiction. *Res judicata*.

—s. 106. See Act XVIII of 1873.

—XIX. See Act XVIII of 1873.

—ss 43, 83, 241, cl. (b)—*Vendor and purchaser—Agreement—Jurisdiction of Civil Court—Cause of Action—Assessment of Revenue*] The purchaser of a certain estate paying revenue to Government agreed with the vendors, shortly after the sale, that they should retain a certain portion of such estate free of rent, and that he would pay the revenue payable in respect of such portion. In 1853, in a suit by the vendors against the purchaser to enforce this agreement, the Sudder Court held that the revenue payable in respect of such portion of the estate was payable by the purchaser. In 1875, on a fresh settlement of the estate, the representatives in title of the purchaser applied to the settlement officer to settle such portion of the estate with the representative in title of the vendors. The settlement officer refused this application, but it was subsequently allowed by the superior revenue authorities. The representative in title of the vendors then sued the representatives in title of the purchaser in the Civil Court, claiming "that he might, in accordance with the agreement between the vendors and the purchaser, be exempted from paying revenue in respect of such portion, as against the defendants, without any injury to the Government: that the defendants might be ordered to pay as heretofore such revenue: and that the defendants might be ordered never to claim or demand from him any revenue they might be compelled to pay in respect of such portion."

*Held, per SPANKIE, J.*, that, assuming that the agreement between the vendors and the purchaser was enforceable, the act of the defendants in moving the settlement officer to settle such portion of the estate with the plaintiff gave the plaintiff a cause of action. Also that, the object of the plaintiff's suit being to obtain a declaration that, as between him and the defendants, the latter were bound to pay revenue in respect of such portion, the suit was not barred by cl. (b), s. 241 of Act XIX of 1873. Also that, although the revenue authorities might regard the decision of the Sudder Court as binding on the parties then before the Court, for the currency of the then settlement, that decision, that settlement having expired, and s. 83 of Act XIX of 1873 having come into force, could not control the power of the revenue authorities to settle the land in question with the plaintiff who was its proprietor.

*Held, per OLDFIELD, J.*, that, with reference to ss. 43 and 83 of Act XIX of 1873, the Civil Courts could not relieve the plaintiff of his liability to pay revenue.

*Held* by the Court that, in the absence of proof that the agreement by the purchaser was intended to extend beyond the period of

the settlement then current, and that it was binding upon his representatives in title, the plaintiff could not obtain the declaration which he sought.

Hira Lal v. Ganesh Prasad ... 415

ACTS—1873—XIX., ss. 61, 65, 91, 257—*Wajib-ul-arz—Pre-emption—Record-of-rights*] A *wajib-ul-arz* prepared and attested according to law is *prima facie* evidence of the existence of any custom of pre-emption which it records, such evidence being open to be rebutted by any one disputing such custom. When such a *wajib-ul-arz* records a right of pre-emption by contract between the shareholders, it is evidence of a contract binding on all the parties to it and their representatives, and there will be a presumption that all the shareholders assented to the making of the record and in consequence were consenting parties to the contract of which it is evidence, and it will be for those shareholders repudiating such contract to rebut such presumption.

Isri Singh v. Ganga

... s. 66—*Cess—Custom.*] A cess leviable in accordance with village custom which is not recorded under the general or special sanction of the Local Government cannot, under s. 66 of Act XIX. of 1873, be enforced in a Civil Court.

A custom to be valid must be ancient, must have been continued and acquiesced in, and must be reasonable and certain.

The fact that a cess leviable in accordance with village custom has been recorded by a settlement officer is important evidence of the custom, but not conclusive proof of it.

Held, on the evidence in this case, that the village custom set up was not established.

Lala v. Hira Singh

... ss. 79, 241. See Jurisdiction. ... ss. 113, 114—*Partition*] Where in the course of carrying out an order for a partition and of assigning the lands to each co-sharer, certain co-sharers claimed certain plots of land as belonging to them in severalty and demanded that the same should be assigned to them, and the Collector decided that some of such plots were held in severalty and one was held in common, held that his decision was not passed under s. 113 of Act XIX of 1873, and was therefore not appealable under s. 114 of that Act.

Shibban Lal v. Tiloke Chand

... ss. 113, 114. See Res judicata. ... 1877—III, ss. 17, 18, 50—Act VIII. of 1871, ss. 18, 50—*Registered and unregistered documents.*] A document creating an interest in immoveable property the registration of which under Act VIII. of 1871 was compulsory, and which was registered under that Act, does not under s. 50 of that Act take effect as regards such property against an unregistered document relating to such land, the registration of which under Act VIII. of 1871 was optional.

Held that the provisions of s. 50 of Act III. of 1877 did not apply to documents executed after the first day of July, 1871, and before Act III. of 1877 came into operation.

Bhola Nath v. Baldeo

... ss. 36, 76, 77—*Contract of sale—Suit to enforce registration of conveyance*] Held, where a person had agreed to sell another certain immoveable property, and had conveyed the same to him by a deed of sale which, under the Registration Act of 1877, required registration, and the vendor refused to register such deed, that it was not incumbent on the vendee to take steps under that Act to compel the vendor to register before he sought relief in the Civil Court, but that he was at liberty without doing so to sue the vendor in the Civil Court for the registration of such deed.

Ram Ghulam v. Chotey Lal

... s. 50—*Effect of registration and non-registration—Optional and compulsory registration—Act VIII of 1871*] Held

that under s. 50 of Act III of 1877 a document of which the registration was compulsory under that Act, and which was registered the e- under, took effect, as regards the property comprised in the docu- ment, as against another document of a prior date, relating to the same property, executed while Act VIII of 1871 was in force, and which did not require, under that Act, to be registered, and was not registered under it.

Ganga Ram, guardian of Kuar Gir Prasad v. Hansi .. 431  
 ACTS—1877—III, s. 50—*Optional and compulsory registration—Act VIII*

*of 1871—Act I of 1868, s. 6—Registered and unregistered document.] Held, in the case of a document executed while Act VI.I of 1871 was in force, the registration of which under that Act was optional, and which was not registered thereunder, and of a document executed after Act III of 1877 had come into force, the registration of which under that Act was compulsory, and which was registered there- under, both documents relating to the same property, that under the provisions of s. 50, Act III of 1877, the registered document took effect as regards such property against the unregistered document, the provisions of s. 6 of Act I of 1868 notwithstanding.*

Lachman Das v. Dip Chand ..

X. ss. 2, 3, 244, 584, 588 (j). | *Execution of decree—Appeal from order—Act VIII of 1859—Repeal—Pending Proceedings—Act I. of 1868, s. 6.] The Court executing a decree for the removal of certain buildings made an order in the execution of such decree directing that a portion of a certain building should be removed as being included in the decree. On appeal by the judg- ment-debtor the lower appellate Court, on the 22nd September, 1877, reversed such order. Held, per FRANKLIN, J., on appeal by the decree-holder from the order of the lower appellate Court, that the lower appellate Court's order, being within the scope of the definition of "decree" in s. 2 of Act X. of 1877, was appealable under s. 584 of that Act, as well as under Act VIII of 1859, notwithstanding its repeal, in reference to s. 6 of Act I. of 1868. The Full Bench ruling in *Thakur Prasad v. Ahsan Ali* followed.*

*Held, per STUART, C. J., dissenting from the Full Bench ruling in *Thakur Prasad v. Ahsan Ali*, that a second appeal in the case would not lie.*

Uda Begam v. Imam-ud-din ..

ss. 2, 18, 540—*Decree—Judgment—Appeal]* The plaintiff in this suit sued for the possession of certain land, on the ground that he was the owner thereof in virtue of a purchase from N. The defendants claimed such land as owners on the ground that it was included in a certain garden which they had previously purchased at a sale in the execution of a decree against N, and they also claimed it on the ground that they were lessees thereof under a lease from N, the term whereof had not expired. They also set up as a defence to the suit that it had been finally determined in a former suit between themselves and N, whom the plaintiff repre- sented, that such land was included in such garden, and that con- sequently their title to such land as owners could not be questioned in the present suit. The Court of first instance held that such land was not included in the defendants' garden, and they were not the owners of it, but that they could not be ejected from it as they were in possession under the lease which had not expired, and that the question whether such land was included in the defendants' garden and they were the owners of it was not *res judicata*. It made a decree dismissing the suit in these terms: "Ordered, that the plaint- iff's claim as it stands at present be dismissed." *Held* (STRAIGHT, J. dissenting) that the defendants were entitled, under s. 540 of Act X of 1877, to appeal from such decree

Lachman Singh v. Mohan ..

ss. 2, 232, 233, 246, 540—*Execution of decree— Appeal from order—Assignment of decree—Cross-decrees.] An order made in the execution of a decree disallowing the objections taken*

by the judgment-debtor to execution of the decree being taken out by a transferee by assignment of the decree, being the final order in a judicial proceeding, and therefore a "decree" within the meaning of s. 2 of Act X of 1877, is appealable under that Act. *Thakur Prasad v. Ahsan Ali* followed.

S and two other persons held a decree for costs against M, which did not specify the separate interests of each in the decree, and M held a decree for money against S alone, which he wished to treat as a cross-decree under s. 246 of Act X of 1877. Held that the decree held by S and the other persons was not a decree between the same parties as the parties to the decree held by M, and M's decree could not therefore be treated as a cross-decree under that section.

*Murli Dhar v. Parsotam Das* ...

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**ACTS**—1877—X, ss. 2, 520, 521, 522, 525, 526, 538—*Arbitration—Filing of award—Appeal*] Where, in a suit for the filing of an award made on a private reference to arbitration, the Court of first instance, holding that there was no reason to remit such award to the reconsideration of the arbitrator, under the provisions of s. 520 of Act X of 1877, or to set it aside under s. 521 of that Act, did not proceed to give judgment according to such award followed by a decree, but merely directed that such award should be filed, held that its order was not appealable as a decree, or as an order.

*Ramadhin v. Mahesh* ...

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s. 13. See *Res judicata*.

ss. 13, 43—Act XII of 1879, s. 7—*Bond for the payment of money hypothecating property as collateral security for such payment—Omission of claim*] The obligee of a bond for the payment of money, hypothecating immovable property as collateral security for such payment, sued for the moneys due on the bond, but omitted to claim the enforcement of his lien, and obtained a decree only for the payment of the amount of the bond-debt. He subsequently sued to enforce his lien. Held that, under s. 43 of Act X of 1877, as amended by s. 7 of Act XII of 1879, he could not be permitted to sue to enforce his lien.

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ss. 28, 29, 32—*Addition of parties*.] Held, reading ss. 28, 29, and 32 of Act X of 1877 together, that, where an application is made under s. 32 for the addition of a person whether as plaintiff or defendant, such person should, as a general rule, be added, only where there are questions directly arising out of and incidental to the original cause of action, in which such person has identity or community of interest with the original plaintiff or defendant.

Two suits against K for possession of the property of B, deceased, were instituted in the Court of a Subordinate Judge by parties claiming adversely to one another as heirs to B. The Subordinate Judge, on the application of the plaintiffs in these suits, under s. 32, Act X of 1877, added the plaintiffs in the first suit as defendants in the second, and the plaintiffs in the second suit as defendants in the first. Held, on appeal by the defendant K, from the orders of the Subordinate Judge, applying the rule stated above, that such additions of parties, not being necessary to enable the Subordinate Judge "effectually and completely to adjudicate upon and settle all the questions involved in the suits," were not proper.

The principles on which s. 73 of Act VIII of 1859 should be interpreted enunciated by Sir Barnes Peacock in *Joy Gobind Dass v. Gourie Prashad Shaha*; *Raja Ram Tewary v. Luchman Pershad*; and *Ahmed Hosain v. Khodeja*; and the remarks of Pontifex, J., in *Mahomed Budhas v. Nicol* followed and applied.

*Naraini Kuar v. Durjan Kuar* ...

*Naraini Kuar v. Piarey Lal* ...

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s. 32. See Act XVIII of 1873.

ss. 32, 311, 312, 538 (m), 647—*Execution of decrees—Application to set aside sale of immovable property—Auction-purchaser—Appeal*] Where, after a judgment-debtor has applied, under

s. 311 of Act X of 1877, to have a sale set aside, the auction-purchaser is made a party to the proceedings, and the sale is set aside, the auction-purchaser can appeal against the order setting aside the sale. <i>Kanhi Ram v. Bankey Lal</i> followed.	
Gopal Singh v. Dular Kuar	352
ACTS—1877—X, ss. 82, 582— <i>Appellate Court, powers of—Addition of parties—Act XV of 1877, s. 22.</i> ] <i>S</i> sued <i>N</i> and <i>R</i> jointly and severally for certain moneys. The Court of first instance gave <i>S</i> a decree for such moneys against <i>N</i> and dismissed the suit against <i>R</i> . <i>N</i> appealed from the decree of the Court of first instance, but <i>S</i> did not appeal from it. The Appellate Court, at the first hearing of <i>N</i> 's appeal, made <i>R</i> a respondent, the period allowed by law for <i>S</i> to have preferred an appeal having then expired, and eventually reversed the decree of the Court of first instance, dismissing the suit as against <i>N</i> and giving <i>S</i> a decree against <i>R</i> . <i>Held</i> that, although the Appellate Court was competent to make <i>R</i> a party to the appeal, under ss. 82 and 582 of Act X of 1877, yet it was not competent, with reference to s. 22 of XV of 1877, to give <i>S</i> a decree against <i>R</i> , the former not having appealed from the decree of the Court of first instance within the time allowed by law.	
Ilanjit Singh v. Sheo Prasad Ram	487
ss. 32, 588— <i>Addition of parties—Appeal—Act XII of 1879, s. 90 (2).</i> ] An order refusing an application under s. 82 of Act X of 1877 by a person to be added as a defendant in a suit is not appealable.	
Karman Biti v. Misri Lal	904
ss. 44, 45. <i>See</i> Act VII of 1870	
ss. 50, 58. <i>See</i> Act XI of 1865, s. 6	
s. 53. <i>See</i> Act XV of 1877, s. 4	
ss. 53, 562— <i>Plaint, amendment of—Remand by Appellate Court</i> ] By the amendment of the plaint, a suit for the restoration of a pond, which it was alleged the defendants were wrongfully filling up, to its original condition, was altered into one for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and the use of the water, by way of easement. <i>Held</i> that the alteration in the plaint was a material one.	
<i>Held</i> also that an appellate Court is not empowered by Act X of 1877 to order or allow a plaint to be amended, or to remand a case under s. 562 of that Act for the purpose of such amendment.	
Farzand Ali v. Yusuf Ali	669
s. 54 (b)— <i>Appeal when presented—Memorandum of appeal insufficiently stamped—Limitation</i> ] For the purposes of limitation, an appeal is preferred when the memorandum of appeal is presented to the proper officer, and not when, where the memorandum of appeal is insufficiently stamped and is returned in order that the deficiency may be supplied, it is again presented.	
When an appellate Court returns an insufficiently stamped memorandum of appeal, in order that it may be sufficiently stamped, it should fix a time within which the deficiency is to be supplied.	
Sheo Partab Narain Singh v. Sheo Gholam Singh	875
ss. 57 (c) and 588 (e)— <i>Return of Plaint—Appeal—Act XII of 1879, s. 2</i> ] Although s. 57 of Act X of 1877 contemplates the return of the plaint, should error be patent, when it is first presented, yet there is nothing in the wording of that section which forbids the return of the plaint at a later stage in the suit.	
Where, therefore, after the issues in a suit were framed, the Court decided that it had no jurisdiction, and returned the plaint to be presented in the proper Court, <i>held</i> that in so doing the Court acted under s. 57 of Act X of 1877, and its decision, not coming within the definition of a "decree" in s. 2 of Act XII of 1879, was not appealable as such, but was appealable under s. 588 of Act X of 1877 as an order.	
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- s. 99—*Failure of plaintiff to pay Court-fee for issue of summons—Non-appearance of defendant—Act VIII of 1859, s. 110—Act XXIII of 1861, ss. 5, 7—Fresh suit.*] Where the plaintiff in a suit failed to deposit *talabana* required for the purpose of issuing summonses to certain persons whom it was proposed to make defendants in addition to the original defendants in such suit, and the Court on that ground irregularly dismissed such suit as against such original defendants by an order purporting to be made under s. 110 of Act VIII of 1859, on a day previous to that fixed for the hearing of such suit, *held* that such order of dismissal did not preclude the plaintiff from instituting a fresh suit.
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- ss. 166, 273—*Execution of decree—Sale of a money-decree.*] *Held* that Act X of 1877 does not contemplate the sale of a decree for money as the result of its attachment in the execution of a decree, and the attachment of a decree for money in the mode ordained in s. 273 cannot lead to its sale.  
*Held* also that the last clause but one of s. 273 applies to other than money-decrees.
- Where two decrees for money, although they were not passed by the same Court, were being executed by the same Court, *held* that the provisions of the first clause of s. 273 of Act X. of 1877 were applicable on principle.
- Sultan Kuar v. Gulzari Lal ... 290
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- s. 206—*Decree—What it is to contain.* The plaintiff sued on a bond in which real property was hypothecated. In his claim the property hypothecated was detailed, and the property itself was impleaded as a defendant, and he obtained a decree in the following terms :—“Decree for plaintiff in favour of his claim and costs against defendant.”  
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- Muluk Fukeer Bukhsh v. Manohur Das followed.
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- s. 210—Act VIII of 1859, s. 194.—*Decree payable by instalments.* *Query.*—Whether “a decree for the payment of money” means merely what is commonly known as a money-decree, or includes a decree in which a sale is ordered of immoveable proper-



ty in pursuance of a contract specifically affecting such property, within the meaning of s.194 of Act VIII of 1859, and s. 210 of Act X of 1877.

Where a Court on the ground that the defendant was "hard pressed," directed the amount of a decree to be paid by instalments extending over ten years, and allowed only one-half of the usual rate of interest, *held*, that there was no "sufficient reason" for directing payment of the amount of the decree by instalments, and that such Court had exercised its discretion injuriously to the plaintiff by the length of the period over which instalments were extended, and by allowing a rate of interest less than the ordinary rate.

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**ACTS—1877—X, s. 210—Decree payable by instalments.]** *Held* that the provisions of s. 210 of Act X of 1877 are not applicable in a suit for the recovery of the amount of a bond-debt by the sale of the property hypothecated by such bond.

In such a suit, therefore, the Court cannot direct that the amount of the decree shall be payable by instalments.

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*Decree for money*] There is nothing in s. 210 of Act X of 1877, or elsewhere in that Act, authorising a Court to direct that the amount of a decree should be paid within a fixed time from its date. *Semble* that the provisions of s. 210 of Act X of 1877 are not applicable in a suit for the recovery of the amount of a bond-debt by the sale of the "nankar" allowance hypothecated by such bond.

Bachchu v. Madad Ali ... .. 649

**s. 211, 561—Mesne profits—Procedure on hearing of appeal—Objection]** Where the parties to a suit for certain land and for the payment of mesne profits in respect of the same were co-sharers in the estate comprising such land, and the defendants had themselves occupied and cultivated such land, *held* that the most reasonable and fitting mode of assessing such mesne profits was to ascertain what would be a fair rent for such land if it had been let to an ordinary tenant and had not been cultivated by the defendants.

Both parties appealed from the decree of the Court of first instance, and both the appeals were dismissed by the lower appellate Court. The plaintiff appealed to the High Court from the decree of the lower appellate Court dismissing his appeal, whereupon the defendant took objections to the decree of the lower appellate Court dismissing his appeal. *Held* that such objections could not be entertained.

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**s. 214—Suit for pre-emption—Deposit of purchase-money—Appellate Court, powers of.]** The decree of the Court of first instance, in a suit to enforce a right of pre-emption, directed that the sum which that Court had ascertained to be the purchase-money should be deposited within one month from the date of the decree. The plaintiff appealed, contending that such sum was not the purchase-money. While the appeal was pending the time fixed by the decree of the Court of first instance expired without any deposit having been made. The appellate Court dismissed the appeal, fixing by its decree, of its own motion, a further time for the deposit. *Held*, following *Sheo Prasad Lal v. Thakur Rai*, that the appellate Court was competent to extend the time for making the deposit, and its decision and order did not contravene the provisions of s. 214 of Act X of 1877.

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**s. 228, 232—Execution of decree—Power of the Court in executing transmitted decree—Transfer of decree.]** Where a decree was sent to a Court for execution, and was subsequently transferred by assignment, and the transferee applied for the execution of the decree to the Court to which the decree was sent for execution, *held*

that such application should be made, not to such Court, but to the Court which passed the decree.

**ACTS—1877—X. s. 230—Execution of decree]** *Kadir Bakhsh v. Ilahi Bakhsh* ... 283  
*Held* that the words "the last preceding application" in the third clause of s. 230 of Act X of 1877 mean an application under that section, and not an application under Act VIII of 1859.

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*Execution of decree—Limitation.]* The concluding clause of s. 230 of Act X of 1877 refers to the question of limitation, not that of due diligence.

Where, therefore, the decree-holder had not on the last preceding application under s. 230 of Act X of 1877 used due diligence to procure complete satisfaction of the decree, and Act X of 1877 had not been in force three years, *held* that the provisions of the third clause of s. 230 of Act X of 1877 were applicable to a subsequent application under that section.

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**ss. 230, 232—Execution of decree—Transfer of decree—Due diligence]** The transferee of a decree applied, while an application by the original holder of such decree to execute it was pending, to be allowed to execute it. The Court in accordance with s. 232 of Act X of 1877 directed notice of the transferee's application to be given to the transferor and the judgment-debtor. The transferee failed to pay the Court-fee leviable for the issue of such notice, and the Court dismissed his application. The transferee subsequently made a second application to be allowed to execute the decree. *Held* that such application could not be rejected, with reference to s. 230 of Act X of 1877, on the ground that due diligence had not been used on the former application to procure complete satisfaction of the decree, because such application had not been granted, and, therefore, the question whether "on the last preceding application" due diligence was used to procure such satisfaction did not arise.

**Sadik Ali Khan v. Muhammad Husain Khan** ... 384

**s. 244—Execution of decree—Separate suit.]** Moneys realized as due under a decree if unduly realized are recoverable by application to the Court executing the decree and not by separate suit. The opinion of Stuart, C. J., in *Agra Savings Bank v. Sri Ram Mitter* differed from *Haromohini Chowdhraim v. Dhonmani Chowdhraim* and *Ekowri Singh v. Bijaynath Chattapadhyaya* distinguished.

**Partap Singh v. Beni Ram** ... 61

**ss. 253, 610—Appeal to Her Majesty in Council—Security for the costs of the respondent—Execution of decree against surety]** An appeal was preferred to Her Majesty in Council from a final decree passed on appeal by the High Court, and B and certain other persons on behalf of the appellant gave security for the costs of the respondent. Her Majesty in Council dismissed the appeal, and ordered the appellant to pay the costs of the respondent. The respondent applied to the Court of first instance for the execution of that order against B and the other persons as sureties. *Held* by STUART, C. J., PEARSON, J., and OLDFIELD, J., that, under ss. 610 and 253 of Act X of 1877, such order could be executed against the sureties.

*Per SPANKIS, J., and STRAIGHT, J.—Contra.*

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**ss. 278, 279, 280, &c.—Objection to attachment of attached property by judgment-debtor—Order against decree-holder—Decree-holder's remedy—Appeal—Suit to establish right.]** An objection was made to the attachment of certain property in the execution of a decree, by the judgment-debtor, on the ground that such property was in his possession, not as his own property, but on account of an endowment. This objection was one of the nature to be dealt with under s. 278 and following sections of Act X of 1877. The Court executing the decree made an order against the decree-holder releasing

the property from attachment. *Held* that such order was not appealable, the fact that the objection was made by the judgment-debtor notwithstanding, and the decree-holder's proper remedy was to institute a suit under the provisions of s. 283 of Act X of 1877.

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ACTS—1877—X, s. 283—*Declaratory decree—Consequential relief—Act VII of 1870 s. 7, cl. iv (c), and sch. ii., art. 17 (iii)—Suit to establish right to attached property.*] In a suit, under s. 283 of Act X of 1877, for a declaration of her proprietary right to certain immovable property attached in the execution of a decree, the plaintiff asked that the property might be "protected from sale." *Held* that consequential relief was claimed in the suit and court-fees were therefore leviable under s. 7, cl. iv, (c), and not under sch. ii, art. 17 (iii) of Act VII of 1870.

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s. 310—*Sale in execution of decree—Pre-emption.*] A cosharer in undivided immovable property of which a share is sold in the execution of a decree does not, under s. 310 of Act X of 1877, acquire the right of pre-emption as against a stranger to whom such share has been knocked down, by merely asserting such right at the time of sale and fulfilling the conditions of sale required by ss. 306 and 307 of that Act. He must bid at the sale and as high as the stranger before he can acquire a right of pre-emption under that section.

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ss. 311, 312—*Sale in execution—Review of judgment*] On the day fixed for the sale of certain immovable property in the execution of a decree, the Court made an order postponing the sale, but the sale had been effected before such order reached the officer conducting it. The Court, no application having been made to set aside the sale, passed an order confirming it. Subsequently, an application by the decree-holder for a review of this order having been granted, the Court passed an order setting the sale aside as illegal. *Held* that the sanction to the sale originally given having been withdrawn, the sale could not legally be held, and that the sale which was effected, the order of postponement notwithstanding, was unlawful and invalid, and in reviewing its first order and in setting aside the sale as illegal the Court executing the decree had not acted *ultra vires* and its action was not otherwise illegal.

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ss. 311, 312, 313, 588 (m)—*Execution of decree—Application to set aside sale of immovable property—Auction-purchaser—Appeal.*] *Held* that, although the auction-purchaser may not apply under s. 311 of Act X of 1877 to have a sale set aside, he yet may be a party to the proceedings after an application has been made under that section, and then, if an order is made against him, he can appeal from such order under s. 588 (m) of Act X of 1877.

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ss. 312, 315—*Sale in execution of decree—Sale set aside—Suit by auction-purchaser to recover purchase-money—Act VIII of 1859, ss. 256, 257, 258.—Warranty—Avent emptor.*

Certain immovable property was attached and proclaimed for sale in the execution of a decree on the application of the decree-holder, H, as the property of his judgment-debtor. W objected to the attachment and sale of such property on the ground that it did not belong to the judgment-debtor, but was endowed property. His objections were disallowed, and the property was put up for sale on the 20th July, 1875, under the provisions of Act VIII of 1859, and was purchased by K. W subsequently sued K to establish his claim to the property and to have the sale set aside, and on the 18th August, 1876, obtained a decree setting it aside. Thereupon K sued H to recover the purchase-money, alleging a failure of consideration. *Held* that, the sale not having been set aside in favour of the judgment-debtor on the ground of want of jurisdiction or other illegality or irregularity

effecting the sale, but having been set aside in favour of a third party who had established his title to the property, and there being no question of fraud or misrepresentation on the part of the decree-holder, the suit was not maintainable. *Rajib Lochun v. Bimalamoni Dasi* and *Sowdamni Chowdhraim v. Krishna Kishor Poddar* followed; *Makundi Lal v. Kaumala*; *Neelkunih Sahee v. Asmun Matho*; and *Dool-hia Hur Nath Koonwerree v. Baiju Oojha* distinguished.

*Held* also that the auction-purchaser could not have applied under s. 315 of Act X of 1877 for the return of the purchase-money, as the provisions of that section could not have retrospective effect, and would not apply to a sale which had taken place before that Act came into operation. *In the matter of the petition of Mulo* dissented from.

*Per* STRAIGHT, J.—That, had the provisions of that section been applicable, instead of instituting a suit, the auction-purchaser should have applied for the return of her purchase-money in the execution of the decree.

ACTS—	Hira Lal v. Karim-un-nisa	...	...	...	780
1877—	X, ss. 312, 588 (m)— <i>Appeal from order setting aside sale of immoveable property in the execution of decree—Act XII of 1879, ss. 90 (16), 102—Act I of 1868, s. 6</i> ]				
	On the 25th June, 1879, a Subordinate Judge made an order setting aside the sale of immoveable property in the execution of a decree from which an appeal was preferred, under Act X of 1877, to the District Court on the 25th July, 1879, before Act XII of 1879 came into force. <i>Held</i> that, as the appeal would not have lain at all, had Act XII of 1879 been in force on the date of its institution, s. 102 of that Act did not apply, but as the appeal lay to the District Court under the law in force on that date, it was competent to dispose of it under the provisions of s. 6 of Act I of 1868.				
	Appeal from order No. 138 of 1879 and Revision Case No. 38B. of 1879 observed on.				
	Durga Prasad v. Ram Charan	...	...	...	785

s. 315—*Sale in execution of decree—Return of purchase-money to auction-purchaser—Act VIII of 1859*] Where immoveable property was sold in the execution of a decree under the provisions of Act VIII of 1859, and the auction-purchaser, having been subsequently deprived of such property on the ground that the judgment-debtor had no saleable interest in it, applied under s. 315 of Act X of 1877 to the Court executing such decree for the return of the purchase-money, *held* that the Court could entertain the application.

*In the matter of the petition of Mulo* ... 299

326—*Execution of decree.*] S. 326 of Act X of 1877 does not apply to a decree which directs the sale of land or of a share in land in pursuance of a contract specifically affecting the same. The Court, therefore, cannot authorize the Collector to stay the sale in such a case under s. 326.

Bhagwan Prasad v. Sheo Sahai ... 856

s. 332—*Execution of decree—Resistance to execution—Act VIII of 1859, s. 230—Repeal.*] A mortgagee who is in possession of the mortgaged property under the mortgage is in possession "on his own account" within the meaning of s. 230, Act VIII of 1859, and s. 332 of Act X of 1877.

Where, in pursuance of an order made in the execution of a decree while Act VIII of 1859 was in force, certain persons were dispossessed of certain property after that Act was repealed, and Act X of 1877 came into force, and such persons applied, under s. 332 of Act X of 1877, to be restored to the possession of such property on certain of the grounds specified in that section, *held* that such persons were entitled to the benefit of that section.

A person claiming under s. 332 of Act X of 1877 need not prove his title but only the fact of possession.

Shafi-ud-din v. Lochan Singh ... 49

**ACTS**—1877—X, ss. 542, 584, 587—*Pre-emption—Cause of action—Conditional sale—Second appeal*] *Per* PEARSON, J., and STRAIGHT, J. (SPANKIE, J., dissenting)—That in disposing of a second appeal the High Court is competent, under s. 542 of Act X of 1877, to consider the question whether the plaintiff has any cause of action or not, although such question has not been raised by the defendant-appellant in the Courts below or in his memorandum of second appeal, but is raised for the first time at the hearing of such appeal.

Also *per* PEARSON, J., and STRAIGHT, J. (SPANKIE, J., dissenting)—That the cause of action of a person claiming the right of pre-emption in the case of a conditional sale arises when the conditional sale takes place and not when it becomes absolute; and therefore, where a conditional sale took place in 1867, and after it had become absolute a person sued to enforce his right of pre-emption in respect of the property sold, basing his claim upon a special agreement made in the interval between the date of the conditional sale and the date that it became absolute, and alleging that his cause of action arose on the latter date, that the suit was not maintainable, the plaintiff having no right of pre-emption at the time of the conditional sale.

*Lachman Prasad v. Bahadur Singh* ...

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—ss. 556, 558, 588—*Dismissal of appeal for appellant's default—Appeal—Act XII of 1879, s. 90 (27)*] Where an appeal is dismissed under s. 556 of Act X of 1877, for the appellant's default, the order dismissing it is not appealable.

*Nand Ram v. Muhammad Bakhsh* ...

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—ss. 560, 584, 588—*Hearing of appeal ex-parte—Refusal to re-hear appeal—Appeal from appellate decree*] An appeal was heard *ex-parte* in the absence of the respondent (defendant), and judgment was given against him. He applied to the Appellate Court to re-hear the appeal, and the Appellate Court refused to re-hear it. He then appealed, not from the order refusing to re-hear the appeal, but from the decree of the Appellate Court. *Held* that he was not debarred, by reason that he had not appealed from the order refusing to re-hear the appeal, from appealing from the decree of the Appellate Court.

*Ramjas v. Baij Nath* ...

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—ss. 566, 567, 578—*Remand—Objection to finding—Appellate Court, powers of—Error or irregularity*] *Held* that an Appellate Court is not bound to accept a finding returned to it by a Court of first instance under s. 566 of Act X of 1877 merely because no objections to such finding are preferred, but is competent to examine the evidence on which such finding is founded and to satisfy itself that it is correct and fit to be accepted. *Noorun v. Khoda Bakhsh* dissented from: *Ratan Singh v. Wazir* followed.

*Held* also that, assuming that an Appellate Court, in deciding a case in a manner inconsistent with and opposed to the finding returned to it by the Court of first instance under that section, in the absence of objections, acted irregularly, its decree could not be reversed, or the case remanded on account of such irregularity, such irregularity not affecting the merits of the case or the jurisdiction of the Court.

*Akhari Begam v. Wilayat Ali* ...

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—s. 578—*Error or irregularity—Court-fee—Appeal*.] The refusal of a plaintiff-respondent to make good a deficiency in court-fee in respect of his plaint when called upon to do so by the Appellate Court is not a ground upon which the Appellate Court should reverse the decree of the Court of first instance and dismiss the suit.

*Mehdi Hussain v. Madar Bakhsh* ...

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—*Release—Reception in evidence of unstamped and unregistered document—Appeal—Fraud—Act VIII of 1859, s. 350—Stamp—Registration—Mortgage*] In June, 1876, L executed a bond in favour of S in which he mortgaged, amongst other property, a village called Chand Khara, as security for the

payment of certain moneys. He subsequently sold such village to A, concealing the fact that it had been mortgaged to S. On this fact coming to the knowledge of A, he threatened L with a criminal prosecution, whereupon L proposed to S in writing that the security of a share in a village called Kelsa, which he alleged was his property, should be substituted for the security of Chand Khara. S accepted this proposal by a letter in which he referred to L's proposal in terms. It subsequently appeared that the share in Kelsa did not belong to L, but to another person. S having sued upon his bond claiming to enforce thereunder a lien upon Chand Khara, A set up as a defence to the suit that S had agreed to substitute Kelsa for Chand Khara in the bond, producing S's letter as evidence of the agreement. *Held* that such letter operated as a release and should therefore have been stamped and registered.

*Held* also that an objection may properly be taken in a Court of first appeal to an unstamped document, and such Court is bound to entertain the objection and may direct that the document be stamped and the penalty imposed.

*Held* also that L's fraud vitiated S's agreement to substitute the security of Kelsa for the security of Chand Khara in the bond, and S was entitled, notwithstanding A might have purchased the latter property in good faith, to the enforcement of the lien created thereon by the bond.

*Mark Ridded Currie v. S. V. Mutu Ramen Chetty* discussed.

*Safdar Ali Khan v. Lachman Das* ...

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**ACTS**—1877—X., ss. 594, 595, 596—*Appeal to her Majesty in Council—Interlocutory Order—Order.*] The District Judge of Ghazipur re-called to his own file the proceedings in the execution of a decree which were pending in the Court of the Subordinate Judge of Shahabad, and disallowed an application for the execution of the decree which had been preferred to that Judge. The High Court, on appeal from an order of the District Judge, annulled his order as void for want of jurisdiction and remitted the case in order that the application might be disposed of on its merits, directing that the record of the case should be returned to the Subordinate Judge of Shahabad. On an application for leave to appeal to Her Majesty in Council from the order of the High Court, *held* that such order was in the nature of an interlocutory order, and was not one from which the High Court could or ought to grant leave to appeal to Her Majesty in Council.

*Palak Dhari Rai v. Radha Prasad Singh* ...

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—XV., s. 2, sch. ii, art. 64—*Suit for money due on accounts stated—Act IX of 1871, sch. ii, art. 62.—“Title” acquired under Act IX of 1871—Suit for money lent.*] The plaintiff sued the defendant for money due upon accounts stated between them in December, 1874, when Act IX of 1871 was in force. Such accounts were not signed by the defendant. The suit was instituted after Act XV of 1877, which repealed Act IX of 1871, had come into force. *Held* that the plaintiff's right to sue upon such accounts within three years from the date the same were stated was not a “title” acquired under Act IX of 1871, within the meaning of s. 2 of Act XV of 1877, which, under the provisions of that section, was not affected by the repeal of Act IX of 1871, and the suit was not governed by the provisions of Act IX of 1871, but by those of Act XV of 1877, and that, therefore, the accounts not being signed by the defendant, the plaintiff could not claim the benefit of art. 64 of sch. ii of the latter Act, but must be regarded as suing merely for money lent.

*Thakurial v. Sheo Singh Rai* ...

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—s. 4—*Amendment of Plaint—Limitation—Act X of 1877, s. 55—Mortgage—Oral Evidence—Documentary Evidence—Act I of 1872, ss. 92, 95.* The plaint in a suit for money charged upon immoveable property which described such property as “the defendant's one biswa five biawansi share within the jurisdiction of the Court,” was presented on the 21st November, 1878, within the period of limitation prescribed for such a suit by Act XV of 1877. It was subsequently

returned for amendment, and, having been amended by the insertion of the words "in mauza S, pargana S" after the word "share," was presented again on the 8th January, 1879, after such period. *Held* that the date of the amendment of the plaint did not affect the question of limitation for the institution of the suit, and the return of the plaint for amendment and its subsequent presentation and acceptance by the Court did not constitute a fresh institution of the suit.

The obligors of a bond for the payment of money describing themselves as "sons of R, zemindar and pattidar, resident of mauza S" hypothecated as collateral security for such payment "their one biswa five biswansi share." *Held*, in a suit on the bond to enforce a charge on the one biswa five biswansi share of the obligors in mauza S, that, under *Proviso* 6, s. 92, and s. 95, of Act I of 1872, evidence might be given to show that the obligors hypothecated by the bond their share in mauza S.

Ram Lal v. Harrison ... ..

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ACTS—1877—XV., s. 14—*Computation of period of Limitation*—On the 26th August, 1878, R and B joined in instituting a suit in the Court of the Subordinate Judge the period of limitation of which expired on the 21st September, 1878. This suit was transferred to the District Court, which, on the 16th September, 1878, returned the plaint to the plaintiffs on the ground that they should have sued separately. On the 23rd September, 1878, R presented a fresh plaint to the District Court, which, on the 1st October, 1878, made an order rejecting it on the ground that he should have instituted the suit in the Court of the Subordinate Judge. R appealed from this order to the High Court, which affirmed it on the 28th January, 1879, but observed that the plaint should be returned to R. On the 10th April, 1879, R's plaint was returned to him, and on the same day he presented it to the Subordinate Judge. *Held* that, in computing the period of limitation, R could not claim to exclude any other period than from the 23rd September, 1878, to the 10th April, 1879, for from the 26th August, 1878, to the 16th September, 1878, he was prosecuting his suit in a Court which had jurisdiction, and the inability of that Court to entertain it did not arise from defect of jurisdiction or any cause of the like nature, but from misjoinder of plaintiffs, a defect for which he must be held responsible, and from the 16th to the 23rd September he was not prosecuting his suit in any Court, and could not claim to have that period excluded.

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—s. 19—*Decree for money payable by Instalments—Execution of decree—Acknowledgment—Limitation*] *Held*, in the case of a decree for money payable by instalments, with a proviso that in the event of default the decree should be executed for the whole amount, that the decree-holder was strictly bound by the terms of the decree, and not having applied for execution within three years from the date of the first default, the decree was barred.

*Held* also, the judgment-debtor having, three years after the first default, acknowledged in writing his liability under the decree, and signed such acknowledgment, that, the decree being already barred, such acknowledgment did not create a new period of limitation.

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—s. 22. See Act VIII. of 1859. Act XV. of 1873.

—sch. ii., art. 10.—*Pre-emption—Limitation*.] On the 19th December, 1876, A gave T a mortgage of his share in a certain village. The terms of the mortgage were that A should remain in possession of his share and pay the interest on the mortgage money annually to the mortgagee, who, in the event of default in payment of the interest, was empowered to sue for actual possession of the share. On the 19th May, 1877, T's name was substituted for that of A in the proprietary registers in respect of the share. On the 8th February, 1878, G sued T and A to enforce his right of pre-emption in respect of the share, alleging that his cause of action arose on the 19th May, 1877, and that A, notwithstanding the mutation of

names, was still in possession. *T* alleged that he had been in possession since the execution and registration of the deed of mortgage. *Held* that, whether *T* had been in plenary possession of the share since the date of the deed, or whether he had had only such constructive or partial possession of it as was involved in the receipt of interest on the mortgage money, the plaintiff was equally bound to have sued within a year from the date of the deed, and was not entitled to reckon the year from the date on which the possession by the mortgagee of the share was recognised by the revenue department, and the suit was therefore barred by art. 10, sch. ii. of Act XV. of 1877.

Gulab Singh v. Amar Singh ... .. 237

**ACTS — 1877—XV, sch. ii, art. 10—Pre-emption—Limitation** [*Held*, in a suit for pre-emption, where the property had been purchased by the mortgagee in possession, that the purchaser obtained physical possession of the property under the sale, not from the date of the sale-deed, but when the contract of sale became completed.

*Held*, therefore, that the contract of sale having become completed on the payment of the purchase-money, the suit, being brought within one year from the date of such payment, was within time.

Lachmi Narain Lal v. Sheoambar Lal ... .. 409

—art. 62—*Suit for damages—Suit for money received to plaintiff's use*] The holder of a decree for money which had been sold in the execution of a decree against him sued the auction-purchaser, the sale having been set aside, for the money he had recovered under the decree. *Held* that the suit was not one for damages but for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, to which the period of limitation applicable was three years.

Bhawani Kuar v. Rikhi Ram ... .. 354

—arts. 62, 120, 132—*Suit for "haq-i-chaharam" based on custom*] *C*, the proprietor of a certain "mohalla," sued *K*, who had purchased a house situated in the mohalla at a sale in the execution of his own decree, for one-fourth of the purchase-money, founding his claim upon an ancient custom obtaining in the mohalla, under which the proprietor thereof received one-fourth of the purchase-money of a house situated therein, whether sold privately or in the execution of a decree. *Held* that the period of limitation applicable to such a suit was that prescribed by art. 120, sch. ii of Act XV of 1877, and not by art. 62 or by art. 132 of that schedule.

Kirath Chand v. Ganesh Prasad ... .. 353

—arts. 66, 67, 75, 80, See Bond.

—arts. 113, 136, 144] *Vendor and purchaser—Transfer of immoveable property—Specific performance of contract*] On the 27th October, 1865, the vendor of certain immoveable property executed a conveyance of such property to the purchasers. On that date the vendor was not in possession of the property, although his title to it had been adjudged by a decree against which an appeal was pending. The conveyance did not contain any express promise or undertaking on the vendor's part to put the purchasers into possession. On the 24th February, 1870, the vendor obtained possession of the larger portion of the property, and on the 23rd August, 1872, of the remainder. On the 5th October, 1877, the purchasers sued the vendor for the possession of the property, stating that "possession was agreed to be delivered on the receipt of possession by the vendor," and that the cause of action was that the vendor had not put them into possession. *Held* that the suit was not one for the specific performance of a contract to deliver possession to which art. 113 of sch. ii of Act XV of 1877 was applicable, but one to obtain possession in virtue of the right and title conveyed to the purchasers to which either arts. 136 or 144 of sch. ii of that Act was applicable, and that, whichever of them was applicable, the suit was within time.

Sheo Prasad v. Udai Singh ... .. 718



**ACTS—1877—**XV, sch. ii, arts. 177, 179 (2), 180—*Execution of decrees—Limitation.*] *Held* that the words “appeal” and “Appellate Court” art. 179 (2), sch. ii. of Act XV. of 1877, include an appeal to Her Majesty in Council.

*Held*, therefore, where an appeal had been preferred to Her Majesty in Council from a decree of the High Court dated the 18th August, 1871, and the High Court’s decree was affirmed by an order of Her Majesty in Council dated the 12th August, 1876, and an application for execution of the High Court’s decree was made on the 15th July, 1879, that, under art. 179 (2), sch. ii. of Act XV. of 1877, the limitation of such application must be computed from the date of the order of Her Majesty in Council.

Narsingh Das v. Narain Das ... .. 763

—1879—I—*Offence against the Stamp Laws—Act XVIII of 1869, s. 34.*] The Collector being primarily responsible for the prosecution of offences against the Stamp Acts of 1869 and 1879 should not himself try, as a Magistrate, a person accused of an offence against either of those Acts.

Empress of India v. Deoki Nandan Lal ... .. 806

—ss. 3, cl. (4), 7, and sch. i, No. 5, (c)—*Stamp—Bond—Agreement.*] One of the clauses of an instrument by which one party to the instrument bound himself, in the event of a breach on his part of any of the conditions of the instrument, to pay the other party thereto a penalty of Rs. 5,000, being regarded as a “bond,” within the meaning of Act I of 1879, such instrument, if that clause were not so regarded, being an agreement chargeable under that Act with a stamp-duty of eight annas, *held* (STUART, C. J., dissenting) that the instrument was chargeable, under s. 7 of that Act, with the stamp-duty leviable on a bond for Rs. 5,000.

*Per* STUART, C. J.—That for the purposes of that Act the penal clause in the instrument should not be regarded separately as a bond, but simply as one of the several clauses making up the entire agreement, and the instrument was only chargeable with a stamp-duty of eight annas.

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—ss. 3, cl. (11), 29, and sch. i, No. 37—*Instrument of partition—Stamp.*] *Held* that the words “the final order” used in the definition of an “instrument of partition” in Act I of 1879 mean not the order authorising a partition to proceed, but the order passed after the partition has been made declaring the various allotments of land. Also that the stamp-duty chargeable under that Act on an instrument of partition is chargeable in respect of the entire property sought to be divided, and not merely in respect of that portion of it allotted to the applicant for partition. Also that for the purposes of that Act the value of the property is to be computed with reference to its market-value and not with reference to the Court Fees Act, 1870.

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—XII, s. 2. See Act X. of 1877, ss. 57 (c.) and 588 (e),

—s. 7. See Act X of 1877, ss. 13, 43.

—s. 90 (27). See Act X of 1877, ss. 556, 558, 538.

—ss. 90 (16), 102. See Act X. of 1877, ss. 312,

588 (m).

**AGREEMENT AFFECTING LAND.—***Transfer of the land.—Covenant running with the land.*] S, by an instrument in writing, duly registered, agreed, for valuable consideration, for himself, his heirs and successors, to pay his wife, A, a certain sum monthly out of the income of certain land, and not to alienate such land without stipulating for the payment of such allowance out of its income. He subsequently gave L a usufructuary mortgage of the land subject to the payment of the allowance. L gave R a sub-mortgage of the land, agreeing orally with R to continue the payment of the allowance himself. *Held*, in a suit by A against L and R for the arrears of the allowance, that

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*A* was not affected by an agreement between *L* and *R* as to the payment of the allowance, and *R* being in possession of the land was bound to pay the allowance.

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**ADOPTION.** See Hindu Law.

**ADULTERY.** See Act XLV of 1860, s. 497.

**ADVERSE POSSESSION.** See Landlord and tenant.

**AJMERE COURTS REGULATION, 1877, ss. 17, 18, 21, 36, 37—**  
*Reference to the High Court by the Chief Commissioner of Ajmere and Mairwara—Reference to Chief Commissioner by Commissioner of Ajmere—Appeal from Commissioner's decree made in accordance with Chief Commissioner's judgment*] On an appeal from a decision in a civil suit of the Assistant Commissioner of Ajmere to the Commissioner of Ajmere, the latter, feeling doubtful on a question of the nature specified in s. 17 of the Ajmere Courts Regulation I of 1877, referred such question, under s. 36 of that Regulation, to the Chief Commissioner of Ajmere and Mairwara. The Chief Commissioner dealt with the case as prescribed in s. 37 of that Regulation, and returned it to the Commissioner, who dismissed the suit in accordance with the Chief Commissioner's judgment. The plaintiff preferred an appeal to the Chief Commissioner from the Commissioner's decision. The Chief Commissioner did not make any order on the memorandum of appeal admitting it, or directing that it should be registered, or that the respondent should be summoned, or that the appellant should appear on a certain day under s. 551 of Act X of 1877; but issued a notice to the appellant's counsel to appear on a certain day. The appellant's counsel appeared on that day, and the Chief Commissioner intimated that he was acting under s. 551 of Act X of 1877. The appellant's counsel then proceeded to address the Chief Commissioner, and was heard for some time, and then stopped, in consequence of the Chief Commissioner resolving to refer to the High Court the question whether the appeal from the Commissioner's decision lay to him or to Her Majesty in Council. The Chief Commissioner subsequently referred such question to the High Court.

*Held* by the Full Bench (SPANKIE, J. dissenting), on a reference by the Division Bench before which the Chief Commissioner's reference came, that such question arose "in the trial of an appeal" within the meaning of s. 21 of the Ajmere Courts Regulation I of 1877, and was properly referred to the High Court.

*Held* by the Division Bench (SPANKIE, J. and STRAIGHT, J.) that the appeal from the Commissioner's decision lay, in this particular case, not to the Chief Commissioner, but to Her Majesty in Council.

Thakur of Masuda *v.* The widows of the Thakur of Nandwara.

**ALIENATION.** See Act VIII of 1859, ss. 239, 244. Hindu Law. 819

**VOLUNTARY—Good Faith—Fraud—Consideration.]** A decree-holder instituted a suit against his judgment-debtor and the latter's son for a declaration that a gift by the judgment-debtor to his son of certain property was fraudulent, and that such property was liable to be taken in execution of the decree. *Held* that, such gift having been made by the donor out of natural love and affection for the donee and in order to secure a provision for him and his descendants, and therefore for good consideration, and having operated, and the donor having reserved to himself sufficient property to satisfy the decree, the mere fact that the donor reserved to himself no property within the jurisdiction of the Court which made the decree was not a ground for holding that such gift was fraudulent, and not made in good faith, and for setting it aside and allowing the decree-holder to proceed against the property transferred by it.

The law relating to voluntary alienations explained.

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**APPEAL.** See Act VIII of 1859. Act X of 1877. Act X of 1872. Limitation.

**APPELLATE COURT, POWERS OF.** See Act VIII of 1859. Act X of 1877.

**ARBITRATION.** See Act VIII of 1859, ss. 323, 324. Act XVIII of 1873. Act X of 1877, ss. 2, 520, 521, 522, &c., Insolvent.

**ARREST.** See Act I of 1872, s. 118. Act X. of 1872, ss. 272, 297.

**ATTACHMENT.** See Act VIII of 1859, s. 209; and ss. 239, 240.

**ATTEMPT.** See Act XLV of 1860, s. 161; and ss. 193, 511.

**AWARD.** See Hindu Law.

**BAILMENT.** See Contract.

**BILL OF EXCHANGE.** See Act I, of 1872, s. 92.

**BOND—Cause of Action—Act XV of 1877, sch. ii, arts. 66, 67, 75, 80.]** B and S executed a bond, dated the 15th August, 1874, in favour of plaintiff in consideration of a loan of Rs. 15,000, agreeing to repay the same within three years from the above date, and covenanting to pay every half-year interest on the same, at the rate of 8 per cent. per annum; and also to pay the premia on certain policies of insurance made over to plaintiff by way of collateral security. In the event of failure in payment on due date of interest and premia, the obligors made themselves liable to pay the full amount of the bond debt. The bond also contained the stipulation that it should be optional with the obligee to claim and if necessary to sue for the full amount of the bond on the failure of any one or more stipulated payment, or on the full expiry of the period of three years.

*Held* that the bond was not an instalment bond, and therefore art. 75, sch. ii. of Act XV. of 1877, was inapplicable.

*Held* by STUART, C.J., that limitation commenced after the expiration of the three years allowed by the bond for payment of the debt.

*Held* by SPANMIL, J.—Art. 80, sch. ii. of Act XV. of 1877, applies to the suit, and limitation would run from the date when the bond became due; that according to the stipulation in the bond it would become due on failure in payment on date of both the interest and premia, and not on failure in payment of either of them only.

*Held* further that arts. 67 and 68, sch. ii. of Act XV of 1877, were not applicable to the suit.

Ball v. Stowell ...

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**BOND—Compound interest—Penalty.]** *Held* that a stipulation in a bond that the interest on the principal sum lent should be paid six-monthly, and, if not paid, should be added to the principal and bear interest at the same rate was not one of a penal nature.

Tejpal, guardian of Kundun Lal, minor, v. Keerl Singh ...

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**Interest]** *Held*, where a bond for the payment of certain money within a certain time did not contain any agreement fixing the rate of interest to be paid after the date it became due, that the question as to the amount of interest to be allowed after that date should be treated as one of damages, and that, having regard to the length of time that had elapsed since the bond ran out (February, 1870,) to the date on which the suit thereon was instituted (26th November, 1873,) interest at the rate of eight annas per cent. per mensem was an equitable rate to allow after the date the bond became due.

*Held* also that but for the plaintiff's laches the rate agreed by the defendant to be paid under the bond (one rupee per cent. per mensem) was a reasonable basis on which to estimate the subsequent damages.

Juala Prasad v. Khuman Singh ...

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**Interest]** D gave M a bond for the payment of certain moneys on a certain date and for the payment of interest on such moneys at Re. 1-12-0 per cent. per mensem, stipulating to pay the interest six-monthly, and in default "to pay compound interest in future." *Held* (i) that the stipulation to pay compound interest could not be regarded as a penal one, and (ii) that the bond contained an agreement to pay interest after the due date at the rate payable before that date, and that if it had been otherwise, the obligee was entitled to interest after that date at that rate, such rate not being unreasonable.

Mathura Prasad v. Durjan Singh ...

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**BOND—Interest—Penalty.]** The obligors of a bond agreed to pay the principal amount by instalments without interest, and in case of default to pay interest at the rate of Rs. 3-2-0 per cent. per mensem, and hypothecated immovable property as security for the payment of the bond-debt, sufficient for the discharge of the debt, and furnished a surety. *Held* by STUART, C. J., in a suit on the bond, that, the principal amount being payable in the first instance without interest, the stipulation to pay interest at the rate of Rs. 3-2-0 per cent. per mensem, in case of default, was a penal one, and reasonable interest should only be allowed. *Held* by SPANGLER, J., that, looking at all the circumstances of the case, the very high rate of interest imposed in case of default should be regarded as penal, and should be reduced.

The Court under the circumstances allowed interest at the rate of one rupee per cent. per mensem.

Chuhar Mal v. Mir

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**Interest—Penalty.]** The defendants on the 8th May, 1869, gave the plaintiff a bond for the payment of Rs. 2,000 on the 16th February, 1870. This amount consisted of two items, viz., Rs. 1,650, principal, and Rs. 350, interest in advance at the rate of two per cent. per mensem for the period between the date of the bond and its due date. The bond provided that, in default of payment on the due date, interest on the whole amount of Rs. 2,000 should be paid at the rate of two per cent. per mensem from the date of the bond. *Held*, in a suit on the bond in which interest was claimed at the rate of two per cent. per mensem from the date of the bond, that this provision was penal, and the penalty ought not to be enforced.

Mazhar Ali Khan v. Sardar Mal

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*See* Act XX of 1866. Act VIII of 1871, ss. 17, cl. (2), 49. Act IX of 1871, sch. ii, art. 75. Act X of 1877, ss. 13, 43. Act I of 1879.

**BRITISH TERRITORY IN INDIA, [POWER OF THE CROWN TO CEDE.—***Held* that the British Crown has the power, without the intervention of the Imperial Parliament, to make a cession of territory within British India to a foreign Prince or feudatory. The opinion expressed by the Privy Council in *Damodar Gordhan v. Deoram Kanji* followed. Question as to what amounts to a cession in sovereignty discussed.

Lachmi Narain v. Raja Partab Singh

1

**BUYING OR DISPOSING OF A PERSON AS A SLAVE.** *See* Act XLV. of 1860, s. 370.

**SELLING MINOR FOR THE PURPOSE OF PROSTITUTION.** *See* Act XLV of 1860, ss. 372, 373.

**CAUSE OF ACTION.** *See* Act IX of 1871, sch. ii, art. 75. Act XIX of 1873, ss. 43, 83, 241 (b). Act X of 1877, ss. 542, 584, 587. Bond.

**CAUSING DEATH BY NEGLIGENCE.** *See* Act XLV of 1860, ss. 304, 304A., 322, 325.

**CAVEAT EMPTOR.** *See* Act VIII of 1859, ss. 256, 257. Act X of 1877, ss. 312, 315. Sale in execution.

**CERTIFICATE OF SALE.** *See* Registration.

**TO COLLECT DEBTS.** *See* Act XXVII of 1860.

**CESS.** *See* Act XIX of 1873, s. 66.

**CLAIM TO ATTACHED PROPERTY.** *See* Mortgage.

**COMMITMENT—Inquiry into case triable by Court of Session.]** *Held*, where a Magistrate had tried a case exclusively triable by a Court of Session, and the conviction of the accused person and the sentence passed upon him at such trial were for that reason annulled by the Court of Session, but the proceedings held at such trial were not annulled, that such Magistrate might commit the accused person to the Court of Session on the evidence given before him at such trial.

Empress of India v. Ilahi Bakhsh

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*See* Act X of 1872, ss. 44, 296.

**COMPENSATION FOR WRONGFUL DISPOSSESSION.** *See* Act XVII of 1873, s. 95, cl. (m) and (n).

- COMPOUND INTEREST. *See* Bond.
- COMPOUNDING OF OFFENCES. *See* Act XLV of 1860, s. 497.
- CONDITION AGAINST ALIENATION. *See* Mortgage.
- CONDITIONAL SALE. *See* Act X of 1877, ss. 542, 584, 587.
- CONFESSION. *See* Act I of 1872, ss. 24, 30, and 33.
- CONSEQUENTIAL RELIEF. *See* Act VII of 1870. Act X of 1877, s. 283.
- CONSIDERATION. *See* Alienation—voluntary.
- CONTEMPT OF COURT. *See* Act X of 1872, ss. 471, 473
- CONTRACT—*Bailment—Government Promissory Note—Contributory negligence—Master and servant.*] The agent of the plaintiff delivered to the Treasury Officer at Meerut nine Government Promissory notes, aggregating Rs. 48,000 in value, in order that such notes might be transmitted to the Public Debt Office at Calcutta for cancellation and consolidation into a single note for Rs. 48,000, having previously indorsed the plaintiff's name on such notes at the request of a subordinate of the Treasury Officer, and received a receipt for such notes under the hand of the Treasury Officer. Owing partly to such indorsements and partly to the negligence of the Treasury Officer such subordinate was enabled to misappropriate and negotiate two of such notes, aggregating Rs. 12,000 in value. The remaining seven of such notes were despatched to Calcutta, and a consolidated note for Rs. 31,200 was returned and delivered to the plaintiff, when the misappropriation of the two notes was discovered. The plaintiff sued Government claiming "that it might be directed to make restitution of the two notes or deliver two other notes of equal value or their value in cash" with interest. On behalf of Government it was contended that it was not liable to the plaintiff's claim, inasmuch as the plaintiff, by his agent, had contributed to the loss of the two notes, and a master was not liable in damages for loss or injury sustained through the fraud or dishonesty of his servant without the scope of his employment. *Held* that, the two notes not having been delivered to the Treasury Officer as a bailee but having been surrendered, the receipt given by that officer must be regarded as an undertaking on the part of Government to deliver a consolidated note for Rs. 48,000 in due course, and the plaintiff's suit was in reality one for damages on account of the refusal of Government to discharge its obligation, the measure of those damages being the amount by which the note for Rs. 31,200 fell short of Rs. 48,000 with interest, and such being the suit, the contention of Government was not any answer to it.
- The Secretary of State for India in Council v. Sheo Singh Rai, 756
- CONTRIBUTION. *See* Mortgage
- CONTRIBUTORY NEGLIGENCE. *See* Contract.
- CO-SHARER. *See* Act XVIII of 1873.
- COURT-FEES. *See* Act VIII of 1859, s. 309. Act VII of 1870. Act X of 1877, s. 578.
- COURT OF SESSION, POWERS OF. *See* High Court, powers of revision.
- COVENANT RUNNING WITH THE LAND. *See* Agreement affecting land.
- CRIMINAL INTIMIDATION. *See* Act X of 1872, s. 489.
- TRESPASS. *See* Act XLV of 1860, ss. 425, 441; and s. 441.
- CROSS DECREES. *See* Act VIII of 1859, s. 209. Act X, of 1877, ss. 2, 232, 233, 246, 540.
- CULPABLE HOMICIDE. *See* Act XLV. of 1860.
- CUSTODY OF CHILDREN. *See* Muhammadan Law.
- CUSTOM. *See* Act XIX of 1873, s. 66.
- DAMAGES. *See* Act XV of 1859. Act XI. of 1865, s. 6.
- DEBTS—*Certificate to collect debts—Alienation of the estate of a deceased person for the payment of his debts—Succession*] Where a person to whom a certificate had been granted under Act XXVII of 1860 to collect the debts due to the estate of a deceased Hindu, but who had no share or interest in such estate, contracted a debt for the purpose of paying debts due from such estate, and charged such estate with the payment of such debt, *held* that the creditor could

not by virtue of the acts of such person claim to recover the moneys advanced by him to such person from the heirs and estate of the deceased, even though such moneys had been applied to the liquidation of the debts of the deceased.

*Munia v. Balak Ram* ...

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**DECLARATORY DECREE.** See Act VII of 1870. Hindu Law. Act X of 1877, s. 283.

**DECREE.** See Act X. of 1877, ss. 2, 13, 540; and s. 206.

**PAYABLE BY INSTALMENTS.** See Act X of 1877, s. 210. Act XV. of 1877, s. 19.

**DISCHARGE OF ACCUSED.** See Act X. of 1872, ss. 44, 296; and s. 215. "DISTINCT SUBJECTS." See Act VII of 1870.

**DIVORCE.** See Muhammadan Law.

**DOWER.** See Muhammadan Law.

**ERROR OR IRREGULARITY.** See Act X. of 1877, ss. 566, 567, 578; and s. 578

**ESTOPPEL.** See Hindu Law.

**EVIDENCE, ADMISSIBILITY OF—GIVEN AT PRELIMINARY INQUIRY BY ABSENT WITNESS.** See Act I. of 1872, ss. 30, 33.

**EVIDENCE, ADMISSIBILITY OF—OF APPROVER AGAINST ANOTHER PERSON CONCERNED IN THE SAME OFFENCE.** See Act I. of 1872, s. 118

**EVIDENCE, RECEPTION IN, OF UNSTAMPED AND UNREGISTERED DOCUMENT.** See ACT X. of 1877, s. 578

**EXECUTION OF DECREE.** See Act VIII of 1859. Act XIV of 1859. Act IX. of 1871. Act X. of 1877. Act XV. of 1877.

**EXECUTION OF DECREE AGAINST SURETY.** See Act X. of 1877, ss. 253, 610.

**EX-PARTE JUDGMENT.** See Act VIII of 1859, ss. 109, 110, 111, 119; 147.

**EXPOSURE OF CHILD.** See Act XLV. of 1860, ss. 304, 317.

**EX-PROPRIETARY TENANT.** See Act XVIII. of 1873, ss. 7, 9.

**FALSE EVIDENCE.** See Act XLV. of 1860, ss. 193, 511.

**FAMILY DWELLING-HOUSE.** See Hindu Law.

**FRAUD.** See Act X. of 1877, s. 578. Hindu Law. (Voluntary) Alienation.

**FRESH SUIT.** See Act X. of 1877, s. 99.

**GIFT—Illegal consideration—Immoral consideration]** In the year 1870 *H* made a gift of certain immoveable property to *W*, who was his mistress but lived with him as his wife; "on condition of her continuing to be his wife and remaining obedient to him, her husband." *W* acquired possession of the property in virtue of the gift, and had held it for eight years, when a creditor of *H* under a decree enforcing a debt created by *H* subsequently to the gift, sued, amongst other things, for a declaration that the gift was invalid, as it had been made for an illegal consideration, viz, the future immoral cohabitation of *W* with *H*. Held that, assuming that the consideration for the gift was illegal, in the absence of fraud, the gift could not be set aside on many years after *W* had acquired possession thereunder. *Ayerst v. Jenkins* followed.

*Lachmi Narain v. Wilayat Begam* ...

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See Muhammadan Law.

**GOOD FAITH.** See (Voluntary) Alienation.

**GOVERNMENT FERRY.** See Act IX. of 1872, s. 23.

**GOVERNMENT PROMISSORY NOTE.** See Contract.

**GRANT OF LAND RENT-FREE.** See Jurisdiction.

**HAQ-I-CHAHARAM.** See Act XV. of 1877, sch. ii arts. 62, 120, 132.

Suit of the nature cognizable in Small Cause Court.

**HAVALAT.** See Act XXVI. of 1870, ss. 3, 45, 54.

**HIGH COURT, POWERS OF REVISION—Act X of 1872. ss. 272, 297—**  
Power of private prosecutor to move the Court in a case of acquittal]  
A private prosecutor can move the High Court, in the case of an acquittal, to exercise its powers of revision under s. 297 of Act X of 1872.

*Sukho v. Durga Prasad* ...

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**HIGH COURT, POWERS OF REVISION—***Act X of 1872, s. 297*] *Held* that great laxity in weighing and testing evidence is a material error in a judicial proceeding within the meaning of s. 297 of Act X of 1872.  
*Empress of India v. Murti* ...

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*Court of Session, powers of—Act X of 1872, ss. 297, 472*] *L* made a complaint against *S* by petition, in which he only charged *S* of having committed offences punishable under ss. 193 and 218 of the Indian Penal Code, but in which he also accused *S* of acts, which, if the accusation had been true, would have amounted to an offence punishable under s. 466 of that Code with seven years imprisonment. The Magistrate inquired into the charges against *S* under ss. 193 and 218 of the Indian Penal Code and directed his discharge. *L* then applied to the Court of Session to direct *S* to be committed for trial on the ground that he had been improperly discharged, which the Court of Session did, and *S* was committed for trial charged under s. 218 of the Code, and was acquitted by the Court of Session. The Court of Session then, under s. 472 of Act X of 1872, charged *L* with offences punishable under ss. 193, 195, 211, and 212 and 109 of the Indian Penal Code, and committed him for trial.

*Held* that such commitment was not bad by reason that an offence under s. 193 of the Indian Penal Code is not exclusively triable by a Court of Session.

*Held also, per* STUART, C. J., (SPARKIE, J., doubting), that the High Court is competent, in the exercise of its power of revision under s. 297 of Act X of 1872, to quash a commitment made by a Court of Session under the provisions of s. 472 of that Act.

*Held also, per* SPARKIE, J., that the Court of Session was competent, notwithstanding that *L* had only charged *S* with offences under ss. 193 and 218 of the Indian Penal Code, to charge *L* with offences under ss. 195 and 211, if such offences had come under its cognizance.

*Empress of India v. Lachman Singh* ...

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*Reference under s. 296 of Act X of 1872 by Court of Session.*] A Court of Session, after it had asked the assessors their opinion in a case which was being tried by it, suspended the trial of the case and made a reference to the High Court under s. 296 of Act X. of 1872, on a question of jurisdiction which had arisen in the trial of the case. *Held* that it was not intended that that section should be so used, and the Court of Session must dispose of such question itself.

*Empress of India v. Bhup Singh* ...

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**REFERENCE TO.** *See* Ajmere Courts Regulation I. of 1877, ss. 17, 18, 21, 36 37.

**HINDU LAW—***Award—Estoppel—Inheritance—Act I of 1872, s. 115.*] *D*, who was the natural brother of *H*, but had been adopted into another family, on the one part, and *G*, on the other part, referred to arbitration a dispute between them concerning the succession to the estate of *S*, the father of *D* and *H*. *H*, having been born deaf and dumb, was, under Hindu law, incapable of inheriting his father's estate, and he was not a party to the arbitration-proceedings. The award, to which *G*, after it was made, expressed his assent in writing, declared that *H* was the heir to his father's estate.

*Held* (SPARKIE, J. dissenting), in a suit by *H* against *G* for possession of a portion of his father's estate, that the plaintiff, not being a party to the award, was not bound thereby, and, not being bound thereby, could not claim to take any advantage therefrom; that the award could not confer on him a right which he did not possess by law, nor could it constitute evidence of a right which the law disallowed; that the assent of the defendant to the award could not convey to the plaintiff a right of inheritance which did not devolve on him by law; that it could not be contended that the defendant had made a gift of the property to the plaintiff, inasmuch as it had been adjudged by the award that the property did not belong to the defendant; that the defendant by his assent to the award was not estopped from question-

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ing the plaintiff's right of inheritance by the provisions of s 115 of Act I of 1872; and that, under these circumstances, the plaintiff could not succeed in his suit.

Ganga Sahai v. Hira Singh ...

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## HINDU LAW—[*Declaratory Decree—Inheritance—Sudra—Illegitimate Son.*]

In a suit merely for a declaration of right in respect of certain property, the lower appellate Court, considering that the suit was really one for the possession of such property, allowed the plaintiff to make up the full amount of court-fees required for a suit for possession. The plaint in the suit was not amended, and the lower appellate Court eventually gave the plaintiff a declaratory decree. *Held*, on second appeal by the defendant, who objected that a suit merely for a declaratory decree could not be maintained, that such objection ought not to be allowed under the circumstances.

The illegitimate offspring of a kept woman or continuous concubine amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra. Under the Mitakshara law the son of a female slave by a Sudra takes the whole of his father's estate, if there be no sons by a wedded wife, or daughters by such a wife, or sons of such daughters. If there be any such heirs the son of a female slave will participate to the extent of half a share only. *Held*, therefore, that *M*, the illegitimate son of an *ahir* by a continuous concubine of the same caste, took his father's estate in preference to the daughters of a legitimate son of his father who died in the father's lifetime.

Sarsuti v. Mannu ...

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[*Adoption*] *Held* that, when an adoption of a son has once been absolutely made and acted on, it cannot be declared invalid or set aside at the suit of the adoptive father.

Sukhbasi Lal v. Guman Singh ...

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[*Adoption of an only son.*] *Held* (TURNER J., dissenting), that the adoption of an only son cannot, according to Hindu Law, be invalidated after it has once taken place.

Hannuman Tiwari v. Chirai ...

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[*Family Dwelling-house—Ancestral property—Mortgage—Sale in execution of decree.*] *L*, a Hindu, mortgaged the dwelling-house of his family, such dwelling-house being ancestral property. *Held*, in a suit against *L*'s mother and wife to enforce the mortgage, brought after *L*'s decease, that the mortgage could be enforced. *Mangala Devi v. Dinanath Bose and Gauri v. Chandramani* distinguished.

Bhikham Das v. Pura ...

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[*Power of the father to alienate ancestral property.*] *F*, during the minority of his son *R*, sold in order to raise money for immoral purposes, the ancestral property of the family. The purchaser acted in good faith and gave value for such property. *Held* by the majority of the Full Bench (SPANKIS, J., and OLDFIELD, J.,) in a suit by *R* against the purchaser and *F* to recover such property and to have such sale set aside as invalid under Hindu law, that such sale was not valid even to the extent of *F*'s share, and that *R* was entitled to recover such property as joint family property. *Held per* PEARSON, J., that *R* could not recover such property, and that the purchaser, having acted in good faith, took by the sale *F*'s share in such property, and might have such share ascertained by partition.

Chamalli Kuar v. Ram Prasad ...

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[*Power of the father to alienate ancestral property*] *D*, in pursuance of a promise to give his daughter a dowry, about two years after her marriage, made a gift of joint ancestral property to *G*, her father-in-law. *P*, *D*'s son, sued his father and *G* to have the gift set aside as invalid under Hindu Law. *Held* that the gift, not having been made with the plaintiff's consent, and not being for any purpose allowed by Hindu Law, was invalid, and that the plaintiff was entitled to have it set aside, not to the extent only of his own share in such property, but altogether.

Ganga Bisheshwar v. Pirthi Pal ...

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**HINDU LAW—Mitakshara—Mortgage by father of joint ancestral property—Sale of joint ancestral property in the execution of a decree against father—Liability of Son's share.]** The undivided estate of a joint Hindu family, consisting of a father and his sons, while in the possession and management of the father, was mortgaged by him, with the knowledge of the sons, as security for the re-payment of moneys borrowed and lent for the use and benefit of the family. The lender of these moneys sued the father to recover them by the sale of the family estate, and obtained a decree against him directing its sale, and sought to bring the family estate to sale in the execution of this decree. *Held*, in a suit by one of the sons to protect his share in such estate from sale in the execution of such decree, that such decree could not be regarded as against the father only, and his share in such property was not alone saleable in execution of it, but such suit and decree must be regarded as against the father as representing the joint family, and the whole of the family estate was saleable in execution of such decree. *Bisnessur Lal Sahoo v. Lachmessur Singh* followed. *Deendyal Lal v. Jugdeep Narain Singh* distinguished.

*Dera Singh v. Ram Manohar* ... ..

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**Mitakshara—Mortgage by a father of ancestral property—Sale of father's rights and interests in the execution of decree—Liability of Son's share.]** The undivided estate of a joint Hindu family consisting of a father and his minor sons and grandsons, while in the possession and management of the father, was mortgaged by him as security for the re-payment of moneys borrowed by him. The lender of these moneys sued the father to recover them by the sale of the family estate, and obtained a decree against him directing its sale. The right, title, and interest of the father only in the family estate was sold in the execution of this decree. The auction-purchasers having taken possession of the family estate, the sons and grandsons joined in a suit against them to recover their shares of the estate. *Held* that the sons and grandsons were entitled to recover their shares of the estate, inasmuch as the auction-purchasers had only acquired by their auction-purchase the rights and interests of the father in the estate, and that, for the same reason, it was unnecessary to inquire into the nature of the debt on account of which the father's rights and interests in the estate were sold. *Deendyal Lal v. Jugdeep Narain Singh* followed. *Girdharjee Lal v. Kantoo Lal* distinguished.

*Held* also that the rulings in those two cases are perfectly consistent,

*Bika Singh v. Lachman Singh* ... ..

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**Joint Hindu family property—Alienation by Father—Son's Rights.]** *G*, a member of a joint undivided Hindu family consisting of himself and his sons, having wrongfully converted to his own use the property of another person, such person sued him for damages for such conversion, and obtained a decree in the execution of which *G*'s rights and interests in the family property were put up for sale and purchased by *C*, who in execution of such decree took possession of such property. *G*'s sons thereupon sued *C* to recover their shares according to Hindu Law of such property. *Held per* OLDFIELD, J., that, although the father's debt was not one which the sons were in duty bound to pay, it might be that, had the family estate passed out of the family under the execution-sale, the sons could not have recovered it from *C*, who was an auction-purchaser and a stranger to the suit against the father. Inasmuch as, however, the claim in that suit was not for a joint family debt, but a personal claim against the father who was alone represented in that suit, and the decree in that suit was against him personally, and it was only his rights and interests that were put up for sale and purchased by *C*, the sons were entitled to recover from *C* their shares of the family property. *Suraj Bunsai Koer v. Sheo Persad Singh* distinguished.

*Per* STRAIGHT, J.—That the sons were entitled to recover their shares of the family property, the decree being purely a personal decree

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against the father, and his rights and interests only in such property having been put up for sale and purchased by C.

Chandra Sen v. Ganga Ram ...

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**HINDU LAW.**—*Joint undivided family property*—*Alienation*—*Assent of co-parceners*—*Stranger*.] The member of a joint Hindu family, who alienates his rights and interests in the family property to a stranger in blood, thereby incapacitates himself from objecting to a similar alienation by another member of such family of his rights and interests in such property, on the ground that such alienation was made without his consent, and such stranger is not competent to make such objection. *Ballabh Das v. Sunder Das* followed.

Ganraj Dubey v. Shezore Singh ...

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—*Hindu widow—Maintenance*.] A wife is under the Hindu law, in a subordinate sense, a co-owner with her husband; he cannot alienate his property or dispose of it by will, in such a wholesale manner as to deprive her of maintenance.

*Held*, therefore, where a husband in his lifetime made a gift of his entire estate leaving his widow without maintenance that the donee took and held such estate subject to her maintenance.

Jamna v. Machul Sahu ...

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—*Widow—Maintenance*.] *Held*, in a suit by a Hindu widow for maintenance, that the circumstance that she was not a childless widow, but had had a son who had died a minor subsequently to his father, was not a ground for reducing the allowance she would have been reasonably entitled to had she been a childless widow.

Narhar Singh v. Dirgnath Kuar ...

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—*Widow—Maintenance*.]—In a case where a Hindu widow is entitled to maintenance, it is better to award a fixed annual sum and not a share of the income of the estate.

Jhunna v. Ramsarup ...

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—*Widow's estate, Forfeiture of—Unchastity during widowhood*.] *Held*, under the Mitakshara law, that a widow, who has once inherited the estate of her husband, is not liable to forfeit that estate by reason of her subsequent unchastity. The ruling of the majority of the Full Bench of the Calcutta High Court in *Kery Kolitany v. Moneram Kolita* followed.

Nehalo v. Kishen Lal ...

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—*Widow's Estate, Forfeiture of—Unchastity during widowhood*.] It is sufficient for the protection of a Hindu widow's right to her husband's estate from forfeiture by reason of unchastity that such right has vested in her before her misconduct. It is not necessary for such protection that she should have acquired possession of the estate before her misconduct.

Bhawani v. Mahtab Kuar ...

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—*Alienation—Reversioner—Fraud*.] *S* was entitled, under the Mitakshara law, to succeed, on the death of *M*, her mother, to the real estate of *N*, her father. Certain persons disputed *S*'s right of succession and claimed that they were entitled to succeed to *N*'s estate on *M*'s death, and complained that *M* was wasting the estate. The difference between such persons and *M* and *N* were referred by them to arbitration, and an award was made and filed in Court which, among other things, partitioned the estate between *S* and such persons. *G*, who claimed the right to succeed to the estate on *S*'s death, sued for the cancellation of the award on the ground that it was fraudulent and affected his reversionary interests. *Held*, relying on *Dowar v. Boonda* that the suit was maintainable notwithstanding that *G* was not the next reversioner.

Gauri Dat v. Gur Sahai ...

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—*Right of succession of daughters to father's estate*.] *Held* that comparative poverty is the only criterion for settling the claims of daughters on their father's estate. *Bakubai v. Manchhabai and Poli v. Narotam Bapu* followed.

Where, therefore, two of four daughters brought suits claiming each a moiety of their father's estate, to the exclusion of the two



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**JURISDICTION.**—*Grant of land exempt from revenue—Grant of land exempt from rent—Regulation XIX of 1793, s. 10—Regulation XLI of 1795, s. 10—Act XVIII of 1873 ss. 30, 95—Act XIX of 1873 ss. 79, 241*] The plaintiff in this suit claimed the possession of certain land in virtue of a grant thereof to him, not merely of the proprietary right in such land, but of the rents of the same undiminished by the payment of the revenue assessed thereon, which the grantor took upon himself to pay.

*Held by* STUART, C. J., PEARSON, J., and OLDFIELD, J., that the grant was null and void and liable to resumption, with reference to ss. 10 of Regulation XIX of 1793 and Regulation XLI of 1795, and s. 30 of Act XVIII of 1873 and s. 79 of Act XIX of 1873.

*Per* SPANKIE, J.—That the question whether the grant was null and void with reference to those Regulations and Acts did not arise, as the grant, on the facts found by the Court below, was not one within the terms of those Regulations.

*Held per* STUART, C. J., PEARSON, J., and SPANKIE, J., that the suit was cognizable by the Civil Courts.

Jagar. Nath Panday v. Prag Singh

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—*Rent-free grant—Act XVIII of 1873, ss. 30, 95 (c)—Act XIX of 1873, ss. 79, 241 (h)*]. The plaintiffs in this suit, zemindars of a certain village, sued for the possession of certain land in such village, alleging that it had been assigned to a predecessor of the defendant to hold so long as he and his successors continued to perform the duties of village watchman, and the defendant had ceased to perform those duties, and was holding as a trespasser. The defendant set up as a defence to the suit that he and his predecessors had held the land rent-free for two hundred years, and that he held it as a proprietor. *Held* that such assignment was not a grant within the meaning of Regulation XIX of 1793, and the plaintiffs' claim was not one to resume such a grant or to assess rent on the land, of which a Revenue Court could take cognizance under ss. 30 and 95 (c) of Act XVIII of 1873 or ss. 79 and 241 (h) of Act XIX of 1873, but one which was cognizable by the Civil Courts.

Puran Mal v. Padma

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—*Suit for the Cancellation of a Document—"Subject-matter in dispute"—Appeal—Act VI. of 1871, s. 22.*] The plaintiffs sued for the cancellation of a bond for the payment of Rs. 6,000 together with interest thereon at the rate of four per cent. per mensem, alleging that they had executed such bond under the impression that it was a bond for the payment of Rs. 3,000 together with interest thereon at the rate of one and a half per cent. per mensem, whereas the defendants had fraudulently caused them to execute the bond in suit. The plaintiffs paid into Court Rs. 3,000 together with interest at the rate of one and a half per cent. per mensem. *Held* that the value of the subject-matter in dispute was the difference between Rs. 3,000 and Rs. 6,000 or thereabouts, and therefore an appeal from the decree of the Court of first instance preferred to the District Judge was cognizable by him.

Kali Charan Rai v. Ajudhia Rai

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—*Suit for money charged on Immoveable property—Mortgage—First and second Mortgages—Sales in execution of decrees enforcing mortgages—Auction-purchasers.*] *Held* that a suit for money charged on immoveable property in which the money did not exceed Rs. 1,000, although the value of the immoveable property did exceed that sum, was cognizable by a Munsif, such property being situate within the local limits of his jurisdiction.

Certain immoveable property was sold on the same day in the execution of two decrees, one of which enforced a charge upon such property created in 1864 and the other a charge created in 1867. *Held* that the purchaser of such property at the sale in the execution of the decree, which enforced the earlier charge, was entitled to the possession of such property in preference to the purchaser of it at the sale in the execution of the decree which enforced the later charge, notwithstanding the latter had obtained possession of the property in

virtue of his purchase. <i>Ajoodhya Pershad v. Moracha Koor</i> distinguished	page
<i>Jahki Das v. Badri Nath</i> .....	698
<b>JURISDICTION.</b> — <i>Suit for redemption of usufructuary mortgage—Valuation of suit—Act VI of 1871 s. 22.</i> ] The plaintiffs sued for the possession of certain immoveable property, alleging that they had mortgaged such property to the defendants, and that the mortgage debt had been satisfied out of the profits of the property. The defendants set up a defence to the suit which raised the question of the proprietary right of the plaintiffs to the property. The value of the mortgagees' interests in the property was below Rs. 5,000; the value of the mortgaged property exceeded that amount. On appeal to the High Court from the original decree of the Subordinate Judge in the suit it was contended that the appeal from that decree lay to the District Court and not to the High Court. <i>Held</i> that the "subject-matter in dispute," within the meaning of s. 22 of Act VI. of 1871, was the mortgage and the mortgagees' rights under it, and that, the value of this being only Rs. 2,000, the appeal should have been preferred to the District Court. Second Appeal No. 1039 of 1877 dissented from.	
<i>Gobind Singh v. Kallu</i> .....	773
— <i>Suit to establish Right to attached Property</i> ] <i>Held</i> that, in the case where a person has preferred a claim to property attached in the execution of a decree, on the ground that such property is not liable to such attachment, and an order is passed against him, and he sues to establish his right to such property, the value of the subject-matter in dispute in such suit, for the purposes of jurisdiction, will be the amount of such decree. Second Appeal No. 320 of 1876, decided the 16th May, 1876 followed.	
<i>Gulzari Lal v. Jadaun Rai</i> .....	779
— <i>See Act XVIII. of 1873. Act XIX. of 1873. Mortgage.</i>	
<b>LANDLORD AND TENANT—Non-payment of rent—Adverse possession—Limitation</b> ] The plaintiffs in this suit, alleging that <i>S</i> , through whom they claimed, had given <i>B</i> , who was represented by the defendants, in July, 1828, the lease of a certain house on the condition that <i>B</i> should pay a certain annual rent for such house and if he failed to pay such rent that he should vacate the house, such condition being contained in a <i>keria-nama</i> executed by <i>B</i> in <i>S</i> 's favour, sued the defendants for the rent of such house for two years, and for possession of the same, alleging the breach of such condition.	
<i>Held</i> (SPARKIE, J., dissenting) that, supposing that a tenancy had arisen in the manner alleged, the mere non-payment of rent by the defendants for twelve years prior to the institution of the suit would not suffice to establish that the tenancy had determined, and that the defendants had obtained a title by adverse possession, so as to defeat the claim; for if once the relation of landlord and tenant were established, it was for defendants to establish its determination by affirmative proof, over and above the mere failure to pay rent.	
<i>Prem Sukh Das v. Bhupia</i> .....	517
— <i>Trees.</i> ] <i>Held</i> that trees accede to the soil and pass to the landholder with the land on the termination of a tenancy, and unless the tenant uses, during the term of his tenancy, his privilege, where he has it, of removing the trees, he cannot do so afterwards; he would then be deemed a trespasser.	
<i>Held</i> also that, where a tenant has been ejected in the execution of the decree of a Revenue Court for arrears of rent from the land forming his holding, his tenancy then terminates, and with it all right in the trees standing on such land or power of dealing with them. A person, therefore, who purchases the rights and interests of a tenant after his ejection in the execution of such a decree, cannot maintain a suit for the possession of the trees standing on the tenant's holding.	
<i>Ram Baran Ram v. Salig Ram Singh</i> .....	596
<b>LEASE.</b> <i>See Act IX. of 1872, s. 23.</i>	

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LETTERS PATENT, cl 10. See Limitation.

**LIMITATION—Appeal** *B* sued *M* and *T* for money due on a bond, and on the 27th April, 1877, obtained a decree against *T*; the suit against *M* being dismissed. *T* applied for a review of judgment, and *B* also made a similar application. On the 25th May, 1877, *T*'s application was granted, and on the 16th July, 1877, *B*'s was rejected. On the 29th June, 1878, the Court re-heard the suit against *T* and dismissed it. *B* appealed, making *T* and *M* respondents, and impugning in his memorandum of appeal the decree of the 27th April, 1877, as well as that of the 29th June, 1878. The appellate Court, assuming that the appeal was one from the decree of the 27th April, 1877, preferred beyond time, admitted it after time, and after hearing the case on its merits gave a decree against *M* and dismissed the suit as regards *T*. *Held* that the appellate Court erred in assuming that the appeal was from the decree of the 27th April, 1877, and that it was at liberty to admit it beyond time, the appeal being from the decree of the 29th June, 1878, that decree being the one which had brought *B* before that Court as an appellant, and that the appellate Court was not competent on an appeal from the decree of the 29th June, 1878, to reconsider the merits of the case against *M*, the appeal from the decree of the 27th April, 1877, being barred by limitation, and that decree and the decree of the 29th June, 1878 being separate and distinct, and not appealable in one memorandum of appeal from the latter decree.

Moti Bibi v. Bikanu

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— *Appeal under cl. 10 of the Letters Patent.* In computing the period of limitation prescribed for an appeal under cl. 10 of the Letters Patent, the time requisite for obtaining a copy of the judgment appealed from cannot be deducted, such copy not being required under the rules of the Court to be presented with the memorandum of appeal

Fazal Muhammad v. Phul Kuar

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— *Constructive trust* *B* and *D*, father and son, were jointly entitled to the moiety of certain property, *B*'s brother *E*, and *K*, *E*'s son, being jointly entitled to the other moiety. *B* and *D* were transported for life. Thirty years afterwards (*B* having meantime died) *D* returned from transportation, and asserted his right to a moiety against a person deriving his title from *E* and *K*, who had taken possession of the whole. *Held*, looking to all the circumstances of the case that *E* and *K* had taken possession subject to a constructive trust in favour of *B* and *D*, and that accordingly *D* was entitled to assert his right, and no limitation could affect it.

Durga Prasad v. Asa Ram

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— *Act VIII. of 1859, s. 13—Pauper petition—Payment of Court fees by petitioner—Date of institution of suit—Transfer of suit.* Where a person, being at the time a pauper, petitions, under the provisions of Act VIII. of 1859, for leave to sue as a pauper, but subsequently, pending an inquiry into his pauperism, obtains funds which enable him to pay the Court-fees, and his petition is allowed upon such payment to be numbered and registered as a plaint, his suit shall be deemed to have been instituted from the date he filed his pauper petition, and limitation runs against him only up to that time.

S 13, Act VIII. of 1859, enacts that, where a suit is brought for immoveable property situated within districts subject to different Sudder Courts, the Judge in whose Court the suit is brought shall apply to the Sudder Court to which he is subject for authority to proceed, and the Sudder Court to which the application is made, with the concurrence of the other Sudder Court within whose jurisdiction the property is partly situated, may give authority to proceed. But no power is expressly given in the section cited, or elsewhere in the Act, to direct the transfer of a suit brought in a Court subordinate to one Sudder Court to a Court subordinate to another Sudder Court. *Quare*—Whether Sudder Courts acting in concurrence have power to make such a transfer.

Stuart Skinner alias Nawab Mirza v. William Orde

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**LIMITATION.** See Act VIII of 1859, s. 377. Act XIV. of 1859, s. 20. Act IX. of 1871. Act X. of 1877, s. 54. Act XV. of 1877. Landlord and Tenant. Trust.

**LIS PENDENS.** See Mortgage.

**MASTER AND SERVANT.** See Contract.

**MEASURE OF DAMAGES.** See Act XV. of 1859, ss. 19, 23, 34.

**MESNE PROFITS.** See Act X. of 1877, ss. 211, 561.

**MISCHIEF.** See Act XLV. of 1860, ss. 425, 441.

**MISSING PERSON.** See Muhammadan Law.

**MORTGAGE.**—*Contribution.*] *M*, *B*, and *N* held mauza *D* in equal one-third shares, and *M* also held a share in mauza *A*. On the 3rd January, 1863, *M* and *B* mortgaged their shares in mauza *D* to *L* to secure a loan of certain moneys. On the 16th March, 1870, *M*, *B*, and *N* mortgaged mauza *D* to *R* to secure a loan of Rs. 600, and on the same day, by a separate deed, they mortgaged mauza *D*, and *M* mortgaged his share in mauza *A*, to *R* to secure a loan of Rs. 1,600. On the 8th December, 1875, *L* obtained a decree for the sale of the shares of *M* and *B* in mauza *D* for the satisfaction of the mortgage-debt due to her. On the 18th April, 1876, *R* obtained a decree for the realization of the mortgage-debts due to him by the sale of mauza *D* and *M*'s share in mauza *A*. On the 23rd October, 1876, the shares of *M* and *B* in mauza *D* were sold in execution of *L*'s decree, and were purchased by *R*. A portion of the purchase money was applied to satisfy *L*'s decree, and the balance of it was deposited in Court. Instead of applying to the Court to pay him this balance in execution of his decree, dated the 18th April, 1876, *R* attached and obtained payment of such balance in execution of a decree for money which he held against *M* and *B*. On the 20th June, 1877, *R*, in execution of his decree, dated the 18th April, 1876, brought to sale *N*'s one-third share in mauza *D*, and became its purchaser. On the 20th July, 1877, *R*, in execution of a decree for money against *M*, brought to sale his share in mauza *A*, and became its purchaser. *Held*, in a suit by *N* against *R* in which he claimed that the sum due by him under the two mortgages, dated the 16th March, 1870, and the decree dated the 18th April, 1876, might be ascertained, and that, on payment of the amount so ascertained, the sale of his one-third share in mauza *D* might be set aside, and such share declared redeemed. *Held* that the sale of *N*'s share in mauza *D* could not be set aside.

*Held* also that, if it were shown that the sum realized by the sale of his one-third share in mauza *D* exceeded the proportionate share of his liability on the two mortgages, he was entitled to recover one moiety of such excess as a contribution from mauza *A*.

As it appeared that there was such an excess the Court gave *N* a decree for a moiety of such excess together with interest on the same from the date of the sale of *N*'s share at the rate of 12 per cent. per mensem, and further directed that, if such moiety together with interest were not paid within a certain fixed period, *N* would be at liberty to recover it by the sale of the share in mauza *A* or so much thereof as might be necessary to satisfy the debt.

*Bhagirath v. Naubat Singh* ... .. 115

—*Contribution*] In March, 1864, the owner of an estate mortgaged it as security for the payment of certain moneys. Subsequently portions of such estate were purchased by the plaintiff and the defendants at an execution-sale. Subsequently again the mortgagee sued the mortgagor and the plaintiff for the mortgage-money, claiming to recover it by the sale of the portion of such estate purchased by the plaintiff. Having obtained a decree, the mortgagee caused a portion of such portion to be sold in the execution of the decree. In order to save the remainder of such portion from sale in the execution of the decree, the plaintiff satisfied the judgment-debt. The plaintiff then sued the defendants for contribution. *Held* that, assuming that the mortgagee, by not including the defendants in his suit

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upon the mortgage-bond, had put it out of his power to proceed at law by another suit on the basis of the same bond against the properties in the possession of the defendants as purchasers, it did not follow that the plaintiff's equitable right to recover a fair contribution from the defendants on the ground of his having paid the whole debt due to the mortgagee was thereby invalidated.

Jagat Narain v Qutub Husain

**MORTGAGE.**—*Condition against alienation*] *Held* that where a person stipulates generally not to alienate his property he does not thereby create a charge on any particular property belonging to him.

Thupal v. Jag Ram

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—*Lis pendens.*] The proprietor of certain immoveable property mortgaged it in July, 1875, to *K* and in September, 1875, to *L*. In October, 1878, he sold the property to *K*. In November, 1878, *L* obtained a decree on his mortgage-bond for the sale of the property. The suit in which *L* obtained this decree was pending when the property was sold to *K*. *K* sued *L* to have the property declared exempt from liability to sale in the execution of *L*'s decree on the ground that the mortgage to *L* was invalid, it having been made in breach of a condition contained in *K*'s mortgage-bond that the mortgagor would not alienate the property until the mortgage-debt had been paid.

*Held* that the purchase by *K* of the equity of redemption did not extinguish his security, it being his intention to keep it alive, and that the purchase of the property by *K* while *L*'s suit was pending did not prevent *K* from contesting the validity of *L*'s mortgage, so far as it affected him, on the ground that it was an infringement of the stipulation in the contract between him and the mortgagor.

Lachmin Narain v. Koteswar Nath

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—*Foreclosure.*] Where a mortgage of an estate is a joint one and there is no specification in it that any individual share or portion of a share of such estate is charged with the repayment of any defined proportion of the mortgage-money, but the whole estate is made responsible for the mortgage-money, it is not competent for the mortgagee to treat a sum paid by one of the mortgagors as made on such mortgagor's own account in respect of what might be calculated as his reasonable share of the joint debt and to release his share from further liability. Where therefore in the case of such a mortgage the mortgagee, in taking foreclosure proceedings, exempted the person and share of the mortgagor so paying and proceeded only against the other mortgagors, and the mortgage having been foreclosed sued the other mortgagors for the possession of their shares of such estate, *held* that, the foreclosure proceedings being irregular, the suit was not maintainable.

Chandika Singh v. Phokar Singh

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—*Property situated partly in Oudh and partly in the North-Western Provinces.*—*Foreclosure.*—*Regulation XVII of 1806, s. 8.*] Where a mortgage of land situated partly in the District of Shahjahanpur in the North-Western Provinces and partly in the District of Kheri in the Province of Oudh was made by conditional sale, and the mortgagee applied to the District Court of Shahjahanpur to foreclose the mortgage and render the conditional sale conclusive in respect of the whole property, and that Court granted such application, *held*, with reference to the ruling of the Privy Council in *Ras Muni Dibiah v. Pran Kishen Das* that, where mortgaged property is situated in two Districts, an order of foreclosure relating to the whole property may be obtained in the Court of either District, that the circumstance that Oudh was in some respects a distinct Province from the North-Western Provinces did not take the case out of the operation of that ruling, inasmuch as Regulation XVII of 1806 was in force in Oudh as well as in the North-Western Provinces at the time of the foreclosure proceedings.

Surjan Singh v. Jagan Nath Singh

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—*Act XL of 1858, s. 18.*—*Mortgage by certificate-holder without sanction.*—*Act IX of 1872, s. 23.*] A mortgage by a person holding



a certificate of administration in respect of the estate of a minor under Act XL of 1858 of immoveable property belonging to the minor without the sanction of the Civil Court previously obtained is void with reference to s. 18 of that Act and s. 23 of the Indian Contract Act, even though the mortgage-money was advanced to liquidate ancestral debts and to save ancestral property from sale in the execution of a decree.

Chimman Singh v. Subran Kuar .. ..

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**MORTGAGE**—*Purchase by mortgagee of a share in mortgaged property—Redemption of mortgage*] Where all the proprietors of an estate joined in mortgaging it, and the mortgagee subsequently purchased the share in such estate of one of the mortgagors, thereby breaking the joint character of the mortgage, and one of the mortgagors sued to redeem his own share and also the share of *B*, another of the mortgagors, held that he was entitled to redeem his own share, but he could not redeem *B*'s share against the will of the mortgagee.

Kuray Mal v. Puran Mal .. ..

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—*Suleh-nama—Agreement creating a charge on immoveable property—Registration—Stamp—Suit for money charged on immoveable property*] Certain immoveable property having been attached in the execution of a decree held by *S*, *B* and *L* objected to the attachment. An arrangement was subsequently effected between the objectors and the parties to the decree which resulted in all parties jointly filing a "*suleh-nama*" in court, in which *B* and *L*, who had purchased the rights of the judgment-debtor in the attached property, agreed to pay the amount of the decree, which exceeded one hundred rupees, within one year, and hypothecated such property as security for the payment of such amount. *S* having sued upon this document claiming to recover the amount of the decree by the sale of such property, held that the document required to be registered, and not being registered the suit thereon was not maintainable.

Cases decided by the High Court in which the "*suleh-nama*," having been relied on, not as containing the hypothecation itself, but as evidence only of a separate parol agreement, or in which a decree having been made in accordance with the terms of the document, was held not to require registration, remarked upon and distinguished by SPANKIS, J.

Surju Prasad v. Bhawani Sahai .. ..

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—*Sale in execution of decree—Vendor and purchaser*.] The proprietors of a taluka and mahal called *B*, assessed with revenue at Rs. 6,800-4-7, to which certain lands which had been gained by alluvion appertained, which lands had been formed into a separate mahal and assessed with revenue at Rs. 88, mortgaged it in these terms: "We agree mutually to mortgage the said taluka *B*, and accordingly after mortgaging and hypothecating the whole of the mauzas original and appended, yielding a *jama* of Rs. 6,800-4-7, along with all original and appended rights, water and forest produce, high and low lands, cultivated and uncultivated lands, &c., &c., and all and every portion of our proprietary, possessory, and demandable rights, without excepting any right or interest obtained or obtainable, &c." Subsequently, the mahal taluka *B*, "together with original and attached mahal and all the zamindari rights appertaining thereto," was sold in the execution of a decree enforcing the mortgage. The auction-purchaser subsequently contracted to sell the "entire taluka *B*, *jama* Rs. 6,800-4-7" but afterwards refused to perform the contract and was sued for its specific performance. The plaint in this suit stated that the subject-matter of the contract was the "entire taluka *B*, *jama* Rs. 6,800-4-7," and the decree which the purchasers obtained for the specific performance of the contract referred to its subject-matter in similar terms.

Held, in a suit by the purchasers for the possession of the alluvial mahal, that the terms of the mortgage were sufficiently comprehensive to include that mahal, and it was not intended by the entry of the *jama* of mahal *B*, exclusive of the *jama* of the alluvial mahal, to exclude the latter from the mortgage, the entry of the *jama* being merely descriptive. Also that the alluvial mahal passed to the auction-

purchaser at the auction-sale, under the words "attached mahal." Also that the sale to the plaintiffs passed the alluvial mahal, the words "the entire taluka B" being sufficient to include it, the entry of the *jama* of mahal B in the sale-contract, plaint, and decree being merely descriptive.

Ganpatji v. Saadat Ali ... ..  
**MORTGAGE.**—*Usufructuary mortgage.*] By the terms of a deed of usufructuary mortgage the mortgagor accepted the liability on account of any addition that might be made to the demand of the Government at the time of settlement. During the currency of the mortgage tenure the mortgagees, averring that they had to pay a certain sum in excess of the amount of Government revenue entered in the deed of mortgage from 1279 to 1281 fasli, sued the mortgagor to recover such excess. *Held* that, inasmuch as no settlement of accounts was contemplated or was necessary under the provisions of the deed of mortgage, and such deed did not contain a provision reserving the adjustment of any sums paid by the mortgagees in excess of the amount of the Government demand at the time of the execution of such deed to the time when the mortgage tenure should be brought to an end, the suit was not premature and could be entertained.

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Nikka Mal v. Sulaiman Shikoh Gardner ... ..

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*Usufructuary mortgage—Hypothecation—Suit for money charged on immoveable property*] M and S executed an instrument in favour of K and G in the following terms: "We, M and S, declare that we have mortgaged a house situated in Ghaziabad, owned and possessed by us, for Rs. 300, to K and G, for two years: that we have received the mortgage-money, and nothing is due to us: that we have put the mortgagees in possession of the mortgaged property. that eight annas has been fixed as the monthly interest, in addition to the rent of the house, which we shall pay from our own pocket: that we promise to pay the aforesaid sum to the mortgagees within two years, and redeem the mortgaged property: that if we fail to pay the mortgage-money within two years, the mortgagees shall be at liberty to recover the mortgage money in any manner they please."

*Held per* STUART, C. J., OLDFIELD, J., and STRAIGHT, J., (SPANKIE, J. dissenting), in a suit upon this instrument to recover the principal sum advanced by the sale of the house, that the instrument created a mortgage of the house as security for the payment of such principal sum. *Dulli v. Bahadur* distinguished.

Phul Kuar v. Murli Dhar ... ..

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*Usufructuary mortgage followed by sale—Revival of mortgage by cancellation of sale—Redemption of mortgage—Attachment in the execution of decree—Claim to attached property—Effect of order under Act VIII of 1859, s. 246*] Z mortgaged in 1859 certain immoveable property, being joint ancestral property, for a term of five years, giving the mortgagee possession of the mortgaged property. In 1861 Z sold this property to the mortgagee, whereupon the sons of Z sued their father and the mortgagee, purchaser, to have the sale set aside as invalid under Hindu law, and in August, 1864, obtained a decree in the Sudder Court setting aside the sale. The mortgagee, purchaser, remained, however, in possession of the property as mortgagee. In May, 1867, Z having sued the mortgagee for possession of the property on the ground that the sale had been set aside as invalid, the High Court held that Z could not be allowed to retain the purchase-money and to eject the mortgagee, purchaser, but must be held estopped from pleading that the sale was invalid. In November, 1867, one K having caused the property to be attached and advertised for sale in the execution of a decree which he held against Z and his sons, the mortgagee objected to the sale of the property on the ground that Z and his sons had no saleable interest in the property. This objection was disallowed by the Court executing the decree, and the rights and interests of Z and his sons were sold in the execution of the decree, K purchasing them. In 1878 K sued, as the purchaser of the equity of redemption, for the redemption of the mortgage of 1859. *Held* that

*K* was entitled to redeem the property. *Held* also that the mortgagee not having contested in a suit the order dismissing his objection to the sale of the property in execution of *K*'s decree, he could not deny that *K* had purchased the rights and interests remaining in the property to *Z* and his sons. *Held* also that the mortgagee had no lien on the property in respect of his purchase-money. *Held* also that, it being stipulated in the deed of mortgage that the mortgagee should pay the mortgagor a certain sum annually as "*malikana*", and the mortgagee not having paid such allowance since the date of the sale, the plaintiff was entitled to a deduction from the mortgage-money of the sum to which such allowance amounted.

Basant Rai v. Kanaui Lal ...

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**MORTGAGE.**—*First and second mortgages—Assignment by mortgagee—Rights of assignees.*] In March, 1865, the proprietors of a certain share in a certain village mortgaged the share to *R*, giving him possession of the share, and stipulating that the mortgagee should take the profits of the share in lieu of interest, and that the mortgage should be redeemed on payment of the principal sum without interest. In April, 1865, *R* mortgaged his rights and interests under the mortgage of March, 1865, to *S*, retaining possession of the share. In February, 1869, the proprietors of the share again mortgaged it to *R* for a further loan. Under this mortgage *R* was entitled to take the profits of the share in lieu of interest, and the mortgage was redeemable on payment both of the principal sum due thereunder and of that due under the mortgage of March, 1865, without interest, or the mortgagors were entitled to redeem a certain portion of the share on payment of a proportionate amount of such sums, without interest, on a particular day in any year. In August, 1872, *S* obtained a decree on the mortgage of April, 1865, directing the sale of *R*'s rights and interests under the mortgage of March, 1865, in satisfaction of such decree. In May, 1874, *R* assigned by sale to *N* his rights and interests under the mortgage of February, 1869, retaining possession of the share. In April, 1877, *R*'s rights and interests under the mortgage of March, 1865, were sold in execution of the decree of August, 1872, and were purchased by *S*, who obtained possession of the share. *Held* in a suit by *N* against *S* to obtain possession of the share in virtue of the assignment of May, 1874, that, under the circumstances of the case, *S* was entitled as against *N* to the possession of the share as first mortgagee.

Sahai Pandey v. Sham Narain ...

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*Usury laws—Obligation on mortgagee to file accounts*] In a mortgage dated in 1852 of *malikana* fixed for the period of settlement, it was agreed that the mortgagee should collect the village *jama*, pay the Government demand, and take the *malikana*, of which part was to be received by him as interest on the money lent at one per cent. per mensem, and the balance, *viz.*, Rs. 565 per annum, was to be retained by him as the costs of collection. No accounts were to be rendered of the *malikana* collected during the time of the mortgagee's possession.

If this agreement had been a contrivance for securing to the mortgagee a higher rate of interest than that to which he was then by law entitled, it would have been void under the usury laws (in force under Regulation XXXIV of 1803 until the passing of Act XXVIII of 1855), and would not have prevented the accounts from being taken.

But as the Courts found that the Rs. 565 per annum constituted a fair percentage, which it had been *bond fide* agreed should be allowed to the mortgagee for the costs of collection, it was *held* that the agreement had been rightly treated as a sufficient answer to a suit based on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied if the accounts (contrary to the agreement) were taken on the basis of charging the mortgagee with the Rs. 565, or so much thereof as he should fail to prove had been actually expended in the collection.

If the amount received by the mortgagee had been fluctuating, production of the accounts might have been necessary for a decision on the

validity of the agreement set up. But it could not be said that by no agreement could a mortgagee relieve himself from the obligation of filing accounts under the 9th and 10th sections of Regulation XXXIV of 1803; and in this case he had done so: the only sum that he was to receive beyond the interest allowed by law being an unvarying balance found to be a fair allowance for the costs of collection.

Badri Prasad v. Murli Dhar ...

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**MORTGAGE.**—See Act XX of 1866, s. 17. Act X of 1877, s. 578. Act XV of 1877, s. 4. Hindu law. Jurisdiction. Registration. Res judicata.

**MUHAMMADAN LAW—Dower.** Where a Muhammadan (Shia), on his marriage, being in poor circumstances, fixed a “deferred” dower of Rs. 51,000 upon his wife, and died without leaving sufficient assets to pay such dower, and his wife sued to recover the amount of such dower from his estate, *held* by STUART, C. J., (PEARSON, J. dissenting) that, it being nowhere laid down absolutely and expressly by any authority on the Muhammadan law that, however large the dower fixed may be, the wife is entitled to recover the whole of it from her husband’s estate, without reference to his circumstances at the time of marriage or the value of his estate at his death, the plaintiff was only entitled, under the circumstances, to a reasonable amount of dower.

*Held* by the Full Bench, on appeal from the decision of STUART, C. J., that a Muhammadan widow was entitled to the whole of the dower which her deceased husband had on marriage agreed to give her, whatever it might amount to, and whether or not her husband was comparatively poor when he married, or had not left assets sufficient to pay the dower-debt.

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**Dower—Restitution of conjugal rights.]** A Muhammadan cannot, according to Muhammadan law, maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by cohabitation for five years, where the wife’s dower is “prompt” and has not been paid. *Abdool Shukkoar v. Raheem-oon-nissa* followed.

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**Gift—Dower.]** *Held* that the provisions of the Muhammadan law applicable to gifts made by persons labouring under a fatal disease do not apply to a so-called gift made in lieu of a dower-debt, which is really of the nature of a sale.

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**Gift.]**—A defined share in a landed estate is a separate property, to the gift of which the objection which attaches under Muhammadan Law to the gift of joint and undivided property is inapplicable.

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**Husband and wife—Divorce.—Repudiation by ambiguous expression.—Custody of minor children]** Where a Muhammadan said to his wife, when she insisted against his wish on leaving his house and going to that of her father, that if she went she was his paternal uncle’s daughter, meaning thereby that he would not regard her in any other relationship and would not receive her back as his wife, *held* that the expression used by the husband to the wife, being used with intention, constituted, under Muhammadan law, a divorce which became absolute if not revoked within the time allowed by that law.

*Held* also, the divorce having become absolute, the parties being *Sunis*, that the husband was not entitled to the custody of his infant daughter until she had attained the age of puberty.

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**Missing person—Act I of 1872, s. 108—Act VI of 1871, s. 24]** *F*, one of the heirs to the property of his parents (the family being Muhammadans) was “missing” when they died, and subsequently when the other heirs to such property sued his daughter *M* for the possession of a portion of such property.

*M* set up as a defence to the suit that her father was alive, and that during his lifetime the plaintiffs could not claim his share in such portion. *Held* by STUART, C. J., and SPANKIE, J., that the suit, being one to enforce a right of inheritance, must be governed by the Muhammadan law relating to a "missing" person. *Farmeskar Rai v. Bisheshar Singh* distinguished.

*Held* by STUART, C. J., that, according to Muhammadan law, ninety years not having elapsed from *F*'s birth, his share could not be claimed by the plaintiffs, but must remain in abeyance until the expiry of that period or his death was proved.

*Held* by PEARSON, J., and SPANKIE, J., that *F*, being a "missing" person when his parents died, his daughter, according to that law, was not entitled to hold his share either as heir or trustee.

Hasan Ali *v* Mahrban

**MUHAMMADAN LAW.**—*Pre-emption.*]—Where a dwelling-house was sold as a house to be inhabited as it stood with the same right of occupation as the vendor had enjoyed, but without the ownership of the site, *held* that a right of pre-emption under Muhammadan law attached to such house.

Zahur *v*. Nur Ali

**MULTIFARIOUS SUIT.** See Act VII. of 1870.

**MUNICIPAL COMMITTEE.** See Act XV. of 1873.

**MURDER.** See Act XLV. of 1860, s. 302.

**NATIVE INDIAN BRITISH SUBJECT.** See Act XI. of 1872.

**NATIVE STATE.** See Act XI. of 1872.

**NON-APPEARANCE OF DEFENDANT.** See Act X. of 1877, s. 99.

**NOTE OR MEMORANDUM.** See Act IX. of 1871, sch. ii, art. 62.

**OCCUPANCY-TENANT.** See Act XVIII. of 1873, s. 9.

**PARTICULARS.** See Act XV. of 1859, ss. 19, 23, 34.

**PARTIES TO A SUIT.**—*Political Agent—Superintendent of Raj*] A suit for property belonging to the Raja of Kota was brought in the name of the "Political Agent and Superintendent of the Kota State, on the part of the Government of India." *Held* that, if the Raja was the proprietor of the property, he should have been the plaintiff, or, if his right and interest therein had passed to Government, the Government should have been the plaintiff, but the Political Agent and Superintendent of the Kota State was not entitled to sue for the property.

Girdhari Das *v*. Powlett

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**PARTITION.** See Act XIX. of 1873, ss. 113, 114.

**PATENT.** See Act XV. of 1859.

**PAUPER SUIT.** See Act VIII. of 1859, s. 309.

**PENALTY.** See Bond.

**PLAINT.** See Act XI. of 1865. Act VII. of 1870. Act X. of 1877.

**PLEADER.** See Act XX. of 1865.

**POLITICAL AGENT.** See Parties to a suit.

**PRECATORY TRUST.** See Will.

**PRE-EMPTION.**—*Wajib-ul-arz*] The greater portion of the lands of a certain village were divided into "thokes," each thoke comprising a certain amount of land, and the rest of the lands were held in common according to the interests of the co-sharers in the village. The *wajib-ul-arz* contained the following provision regarding the right of pre-emption: "Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer should be effected by him in favour of his own brothers and nephews who may be sharers, and, in case of their refusal, in favour of the other owners of the thoke." *Held*, in a suit by a sharer in one thoke to enforce a right of pre-emption, under the *wajib-ul-arz*, in respect of a share in another thoke, that the fact that the plaintiff in common with all the sharers of the different thokes was a sharer in the common lands did not make her a sharer in the vendor's thoke, and she had therefore no right of pre-emption under the *wajib-ul-arz*.

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PUBLIC OR ACTUAL USER. See Act XV. of 1859.

RECORD-OF-RIGHTS. See Act XIX. of 1873, ss. 61, 65, 257.

REGISTRATION—*Certificate of Sale—Mortgage*] Where the Subordinate Judge of Dehra Dun made and signed the following endorsement on a deed of mortgage of immoveable property:—"This deed was purchased on the 1st December, 1875, at a public sale in the Court of Dehra Dun, by N and K, plaintiffs, for Rs. 2,400, under special orders passed by the Court on the 23rd November, 1875, in the case of N and K, plaintiffs, against R, for self, and as guardian of the heir in possession of the estate left by M."—*held per SPANKIE, J.*, that this instrument operated as a sale-certificate, and consequently, as it related to immoveable property of the value of Rs. 100 and upwards, it required to be registered.

*Held per OLDFIELD, J.*—That as the instrument operated to assign the deed of mortgage to the auction-purchasers, it for the same reason required to be registered.

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See Act XX. of 1866. Act VIII. of 1871. Act III. of 1877. Act X. of 1877, s. 578.

REGULATION XIX. of 1793, s. 10. See Jurisdiction.

XLI. of 1795, s. 10. See Jurisdiction.

REGULATION XVII. of 1806 — *Parol conditional mortgage*] K made over to G, from whom he had borrowed certain moneys, certain land on the oral condition that, if such moneys were not repaid within two or three months, such land should become G's absolutely. *Held* that as there was no deed of conditional mortgage the provisions of Regulation XVII. of 1806 were not applicable to G, and he became the owner of such land after the expiry of three months from the date on which it was made over to him, in consequence of the amount of the loan not having been repaid to him.

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s. 8. See Mortgage.

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RENT-FREE GRANT. See Jurisdiction.

RES JUDICATA.—*Suit for rent of the nature cognizable in a Small Cause Court.—Determination of title.*] The incidental determination of an issue of title in a suit for rent of the nature cognizable in a Court of Small Causes does not finally estop the parties to such suit from raising the same issue in a suit brought to try the title.

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Determination of title — Act XIX. of 1863, ss. 8, 9.]

Where M the recorded proprietor of an estate applied to have his share of such estate separated, and an objection was made to such separation by H, another recorded proprietor of the estate, which raised the question of M's proprietary right to a portion of his share, and the Collector proceeded under s. 8, Act XIX. of 1863, to inquire into the merits of such objection, and decided that M's interest in such portion of his share was that of a mortgagee and not a proprietor, and M did not appeal against such decision and it became final, *held*, in a suit in the Civil Court by M against H in which he claimed a declaration of his proprietary right to such portion, that a fresh adjudication of his right was barred.

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Act XVIII. of 1873, s. 95.—*Determination under cl. (a) of title.*] S applied to the Revenue Court, under cl. (a) of s. 95 of Act XVIII. of 1873, for the recovery of the occupancy of certain land, alleging that the occupancy of such land had devolved upon her by inheritance, and that the landholder had wrongfully dispossessed her. The

landholder set up as a defence to this application that *S* was not entitled to the occupancy of the land by inheritance, but that she was a trespasser. The Revenue Court determined that *S* was entitled to the occupancy of the land by inheritance, and granted her application. The landholder then sued *S* in the Civil Court for the possession of the land.

*Held, per* PEARSON, J. and TURNER, J., that the question of *S*'s title to the occupancy of the land was, with reference to the decision of the Revenue Court, *res judicata* and could not again be raised in the Civil Court.

*Per* SPANKIE, J., and OLDFIELD, J., *contra*.

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RES JUDICATA—*Land-holder and Tenant—Determination of title under a lease by a Revenue Court on an application under s. 39 of Act XVIII of 1873*] The plaintiffs in this suit, land-holders, had caused a notice of ejectment to be served on the defendants, their tenants under a lease, on the ground that the tenancy had expired. The defendants applied to the Revenue Court, under s. 39 of Act XVIII of 1873, contesting their liability to be ejected on the ground that the lease was a perpetual lease. The Revenue Court held, with reference to the word "*istimrari*" contained in the lease, that the lease was perpetual, and the defendants were not liable to be ejected. The plaintiffs thereupon sued in the Civil Court for the cancelment of the word "*istimrari*" in the lease, on the ground that it had been inserted fraudulently. *Held*, on appeal from the decree of the lower appellate Court dismissing the suit as barred by the decision of the Revenue Court, that it was not so barred, the matter in dispute being peculiarly within the jurisdiction of the Civil Court, and not one which a Revenue Court was competent finally to determine on an application under s. 39 of Act XVIII of 1873.

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*Determination of title or of proprietary right—Act XIX of 1873, ss. 113, 114.*] In the case of an objection to a partition raising a question of title, it is only when the Collector or Assistant Collector records a proceeding declaring the rights of the parties, after an adjudication of the objection on its merits, that his order becomes an order under s. 113 of Act XIX of 1873, within the meaning of s. 114 of that Act.

Where, therefore, an Assistant Collector made an order disallowing an objection to a partition raising a question of title, on the ground that such question had been determined against the objector in a suit for profits between the parties, *held* that such order was not a decision of a Court of Civil Judicature, within the meaning of s. 114 of Act XIX of 1873, but that it could be contested by a suit in the Civil Court. *Rameshwar Rai v. Subhoo Rai; Bukhta v. Ganga and Harasahai Mal v. Maharaj Singh* distinguished.

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*Act X of 1877, s. 13.*] *M* sued *R* in the Court of the Munsif for a bond, alleging that he had satisfied the bond-debt, and for a certain sum which he alleged had been paid by him to *R* in excess of the bond debt. On the 24th November, 1875, the Munsif, having taken an account and found that Rs. 188-7-4 of the bond-debt were still due, made a decree dismissing the suit. *R* appealed to the Subordinate Judge, who on the 16th September, 1876, finding that Rs. 520-2-2 of the bond-debt were still due, affirmed the Munsif's decree. *M* appealed to the High Court on the ground that an appeal by *R* did not lie to the Subordinate Judge, as *R* was not aggrieved by the Munsif's decree. The Division Bench before which the appeal came, on the 10th August, 1877, holding that *R* was not competent to appeal to the Subordinate Judge, set aside the proceedings of the Subordinate Judge. In deciding the case the Division Bench made certain observations to the effect that the account between the parties was not finally settled, but might be taken again in a fresh suit. In November, 1877, *M* instituted a fresh suit against *R* to recover the bond on payment of Rs. 188-7-4, the sum found by the Munsif in the former suit to be due by him to *R*. *Held*, on the

question whether the finding of the Munsif in the former suit was final and conclusive between the parties or the account might be again taken, that that finding, being a finding on a matter directly and substantially in issue in the former suit which was heard and finally decided by the Munsif, was final and conclusive between the parties and the account could not be again taken.

*Held* also that the observations of the Division Bench in the former suit were mere "*obiter dicta*" which did not bind the Courts disposing of the fresh suit.

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**RES JUDICATA**—*Mortgage—First and second mortgagees*.] In 1870, *M* granted a certain person a lease of a certain zamindari share, for a term of years, at an annual rent, *L*, as the lessee's surety, hypothecating a mauza called *A* as security for the payment of such rent. In 1871 *L* gave *B* a bond for the payment of certain moneys, hypothecating mauza *A* as security for their payment. In 1872, and again in 1873 *M* obtained a decree in the Revenue Court against his lessee and *L* his surety for arrears of rent. In execution of the decree of 1872 *M* caused *L*'s rights and interests in mauza *A* to be put up for sale, and purchased them himself. In 1874 *B* sued *L* and *M* to enforce his lien on mauza *A*. *M* defended this suit on the ground that he was the holder of a prior lien on the property. The Court gave *B* a decree in 1875, holding that he was entitled to an order for the sale of the property, but that it would be competent to *M* to sue to enforce his lien, and that, when he did so, the purchaser under *B*'s decree would have the option of discharging the first incumbrance. The property was accordingly put up for sale in execution of *B*'s decree, and was purchased by *B* himself. In 1876 *M* sued *L* and *B* to enforce his lien on the property, claiming to recover by the sale thereof the amount of the arrears of rent awarded by the decrees of 1872 and 1873, together with the costs awarded him in the Revenue Court, and interest. *Held*, affirming the judgment of STUART, C. J., that the decree of 1875 did not preclude *M* from claiming to enforce his lien on mauza *A*, nor was his claim affected by the circumstance that he had brought to sale in execution of the decree of the Revenue Court the rights and interests of *L* in that mauza. All that was then sold was the equity of redemption, which was sold to satisfy the money-decree held by *M*. No doubt the proceeds of the sale would after satisfaction of the costs of the decree go *pro tanto* to the satisfaction of the sums secured by the first incumbrance, but *M* by selling in execution the mortgagor's equity of redemption did not forego his incumbrance.

*Held* also that *M* could not enforce his lien for the recovery of the costs incurred by him in the Revenue Courts, as the surety-bond did not provide for the payment of such costs; that he could enforce his lien for the recovery of interest, as that bond did provide for the payment of interest; and that the moneys realized by the sale of the equity of redemption of the property in the execution of the Revenue Court's decree of 1872 must be applied, in the first place, in satisfaction of the costs of the suit in which that decree was made, and then in satisfaction of the arrear sued for in that suit, or the balance of that arrear, and of the arrear sued for in the second suit, with interest at the rate agreed upon in the surety-bond from the date of the accrual of those arrears until realization.

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**RESTITUTION OF CONJUGAL RIGHTS.** See Muhammadan Law.

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**REVIEW OF JUDGMENT.** See Act VIII. of 1859, s. 377. Act X. of 1877, s. 311, 312.

**RIGHT OF OCCUPANCY.** See Act XVIII. of 1873.

**RIOTING.** See Act XLV. of 1860, ss. 71, 146, 147, 319, 323.

**SALE IN EXECUTION OF DECREE**—*Warranty—Caveat Emptor.*] In a sale in the execution of a decree of the rights and interests of a



judgment-debtor in an estate of which he is the recorded proprietor in the revenue registers, it is usual to describe such rights and interests in the sale-proceedings as recorded in such registers, but such description does not amount on the part of the decree-holder or the officer conducting the sale to a warranty that such rights and interests are correctly described.

Where, therefore, according to the usual practice, the rights and interests of a judgment-debtor in a share of a village of which he was the recorded proprietor in the revenue registers, were proclaimed for sale in the execution of a decree and sold, described as recorded, and the sons of the judgment-debtor subsequently sued the auction-purchaser to recover their interests in such share and obtained a decree for such interests, and the auction purchaser thereupon sued the decree-holder for a refund of the purchase-money proportionate to such interests and for the costs of defending such suit, *held* there being no fraud or misrepresentation on the part of the decree-holder, or any thing of an exceptional nature showing an express or implied warranty on his part, that the suit was not maintainable. *Neelkunt Sahoe v. Asmu Mathoo* distinguished.

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SPECIFIC PERFORMANCE OF CONTRACT. *See* Act XV of 1877, sch. ii, arts. 113, 136, 144.

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STOLEN PROPERTY. *See* Act X of 1872, ss. 4, 297, 415, 416, 417, 418, 419, 420.

STAT. 11 AND 12 VICT, C. 21, ss. 21, 24, 26, 32—“*Voluntary conveyance by Insolvent*” Where two days before a person was adjudicated an insolvent and his property had by order vested in the Official Assignee, under the provisions of Stat. 11 and 12, Vict. c. 21, such person had, not spontaneously, but in consequence of being pressed, assigned to a particular creditor certain property, *held* by STUART C. J., that such assignment was not “voluntary” within the meaning of s. 24 of that Statute, and was therefore not fraudulent and void under that section as against the Official Assignee.

*Held* by PEARSON, J., that such assignment was not a voluntary one in the sense that it was made spontaneously without pressure, but as the vesting order was not passed on a petition by the insolvent for his discharge that section was not relevant to the case.

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SUIT OF THE NATURE COGNIZABLE IN SMALL CAUSE COURT. — *Haq-i-chabaram—Second Appeal.*] A suit by a zamindar for one-fourth of the price of trees cut by tenants is, when based upon contract, one of the nature cognizable in a Court of Small Causes, and consequently, where the amount claimed is under five hundred rupees, no second appeal lies in such a suit. The principle laid down in *Nanku v. The Board of Revenue* followed.

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Where, therefore, a person who broke into a house by night and committed theft therein was charged and tried for offences under ss. 380 and 457 of the Penal Code, and was convicted of both those offences, and punished for each with rigorous imprisonment for eighteen months, the Court convicted him of the offence under s. 457 and sentenced him to rigorous imprisonment for three years, and acquitted him of the offence under s. 380.

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**TRUST—Wajib-ul-arz—Absconding co-sharers.]** Where a clause of the *wajib-ul-arz* of a village stated in general terms that absconders from such village should receive back their property on their return, and certain persons who absconded from such village before such *wajib-ul-arz* was framed sued to enforce such clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to such *wajib-ul-arz*, alleging that their property had vested in such co-sharer in trust for them, held that before such co-sharer could be taken to have held their property as a trustee there must be evidence that he accepted such trust, and this fact could not be taken as proved by the *wajib-ul-arz*.

Held also that, assuming the trust to be established, as the purchaser had purchased in good faith for value and without notice of the trust, and was not the representative of such co-sharer within the meaning of s. 10 of Act IX of 1871, and had been more than twelve years in possession, the suit was barred by limitation.

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**Wajib-ul-arz—Absent share-holders.]** Held that a village administration-paper which provides for the surrender to absent share-holders on their return to the village of the lands formerly held by them does not necessarily constitute a valid trust in their favour, although it may be evidence of such a trust.

Where a village administration-paper provided for the surrender to certain absent share-holders on their return to the village of the lands formerly held by them, but did not contain any declaration of a trust as existing between such absent share-holders and the occupiers of their lands at the time such administration-paper was framed, held that the administration-paper could not be regarded as evidence of a pre-existing trust between such persons, nor as an admission of such a trust by such occupiers.

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**Assignment by Trustees—Limitation.]** In 1840 the purchasers and recorded proprietors of a four biswas share of a certain village caused a statement to be recorded in the village record-of-rights to the effect that B claimed to be the proprietor of a moiety of such share, and that they were willing to admit his right whenever he paid them a moiety of the sum which they had paid in respect of the arrears of re-

venuedue on such share. In 1843 *M* purchased such share and became its recorded proprietor. In 1877 *K*, the son of *B*, sued the representative of *M*, for possession of a moiety of such share, alleging, with reference to the statement recorded in the record-of-rights, that such moiety had vested in *M*'s assignors in trust to surrender it to *B* or his heirs on payment of a moiety of the sum they had paid on account of revenue, and paying into court a moiety of such sum. *Held* that that statement could not be regarded as evidence of the alleged trust, and that, assuming that the alleged trust existed, the suit was barred by limitation, *M* having purchased without notice of the trust and for valuable consideration.

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**VENDOR AND PURCHASER**—*First and second purchasers.*] The proprietor of certain immoveable property conveyed it first to one person and then to another. The first purchaser sued the vendor and the second purchaser for the possession of the property, alleging that he had been put in possession of it but had been ousted by the second purchaser. *Held* that the first sale was not void by reason of the non-payment of the purchase-money, and that the second sale being invalid as having been made by a person who had no rights and interests remaining in the property, the second purchaser was not a representative of the vendor and entitled to receive the purchase-money found to be still due to him from the first purchaser, and to retain possession of the property until the receipt of that purchase-money.

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**WARRANTY.** *See* Act X. of 1877, ss. 312, 315. Sale in execution.

**WILL**—*Construction*—*Prerogative Trust*] *W. R.*, by his will, left to his wife, *M. A. R.*, the whole of his property in the confidence that she would act justly to their children in dividing the same when no longer required by her. *M. A. R.*, by her will, left to their children certain portions of such property, leaving to their child *A. C. R.*, amongst other things, certain banking shares. These shares were attached in the execution of a decree against the executors to her estate as belonging to such estate. *Held* that she took under her husband's will a life interest only in his property with a power of appointment in favour of the children, and that the shares belonged to *A. C. R.*, and could not be sold in execution of the decree as part of the estate of *M. A. R.*

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*Dr. L. B.*

*Part from missing*

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